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# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CONTEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS,  
WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

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# TABLE

OF

## THE NAMES OF THE CASES

REPORTED IN THIS VOLUME.

 The name of the Additional Case is printed in *Italic*.

A.		C.	
	PAGE		PAGE
Accidental Death Insurance Com-		Capel <i>v.</i> Powell . . . . .	743
pany, Fitton <i>v.</i> . . . .	122	Catterns, Doggett <i>v.</i> . . . .	669
		Chelsea (Vestry), app., King,	
		resp. . . . .	625
B.		Christchurch, Oxford (Dean, &c.)	
Bannister, Eichholz <i>v.</i> . . .	708	<i>v.</i> Buckingham (Duke) . . .	391
Barker <i>v.</i> Metropolitan Railway		Christy, Elwood <i>v.</i> . . . .	754
Company . . . . .	785	Clay <i>v.</i> Ray . . . . .	188
Berresford <i>v.</i> Montgomerie . .	379	Clayton, Helps <i>v.</i> . . . .	553
Best, Saunders <i>v.</i> . . . .	731	Colchester (Mayor, &c.), Mills <i>v.</i>	635
Blackburn, Harrison <i>v.</i> . . .	678	Collingwood, Robinson <i>v.</i> . .	777
Bolekow <i>v.</i> Seymour . . . .	107	Conquest, Marsh <i>v.</i> . . .	418, 432
Bovill <i>v.</i> Hadley . . . . .	435		
Bridges <i>v.</i> Potts . . . . .	314	D.	
Brogden, Walker <i>v.</i> . . . .	571		
Brookes, Eddison <i>v.</i> . . . .	606	Dalton, Litten <i>v.</i> . . . .	178
Buckingham (Duke), Dean, &c.,		Doggett <i>v.</i> Catterns . . . .	669
of Christchurch, Oxford <i>v.</i> .	391	Dresser <i>v.</i> Norwood . . . .	466

E.		PAGE	
Eddison v. Brookes . . . .	606	Horwood v. Wood . . . .	749
Edmondson v. Nuttall . . . .	280	Houghton v. London and County Assurance Co. . . . .	80
Edwards, Reed v. . . . .	245	Hughes, Shoreditch Vestry v. .	137
Eichholz v. Bannister . . . .	708	Humphries, resp., Taylor, app. .	539
Elwood v. Christy . . . . .	754	Hunt, Thomas v. . . . .	183
F.		I.	
Falkland Islands Company, Ron- neberg v. . . . .	1	Inchbald v. Western Neilgherry Coffee Plantation Company .	733
Fish v. Kelley . . . . .	194	J.	
Fitton v. Accidental Death Insu- rance Company . . . . .	122	Jones, Lee v. . . . .	482
Fray v. Fray . . . . .	603	Joyce v. Swann . . . . .	84
G.		K.	
General Discount Company v. Stokes . . . . .	765	Kelly, Fish v. . . . .	194
Gladstone, Marquis of Salisbury v. . . . .	843	King, resp., Chelsea Vestry, app.	625
Göschén, Pearson v. . . . .	352	—, Whiteley v. . . . .	756
Greaves, Nicoll v. . . . .	27	Knight, Heyworth v. . . . .	298
H.		Koebel v. Saunders . . . . .	71
Hadley, Bovill v. . . . .	435	L.	
Hall, Moon v. . . . .	760	Lacey, Lindley v. . . . .	578
Harford, Tobin v. . . . .	523	Lee v. Jones . . . . .	482
Harrison v. Blackburn . . . .	678	Lindley v. Lacey . . . . .	578
Heintzmann, Stearine Kaarsen Fabrick Gonda Co. v. . . . .	56	Litten v. Dalton . . . . .	178
Helps v. Clayton . . . . .	553	London and County Assurance Co., Houghton v. . . . .	80
Henning, Hobbs v. . . . .	791	Lowndes, Ringland v. . . . .	514
Heyworth v. Knight . . . . .	298	M.	
Hill v. Nuttall . . . . .	262	Maddick v. Marshall . . . .	829
Hobbs v. Henning . . . . .	791	Mallan v. Radloff . . . . .	588

## TABLE OF CASES REPORTED.

ix

	PAGE		PAGE
Marsh v. Conquest . . . .	418, 432	Pepper, Nothard v. . . . .	39
Marshall, Maddick v. . . . .	829	Podmore v. Schmidt . . . . .	725
Maugham v. Sharpe . . . . .	443	Potts, Bridges v. . . . .	314
Memoranda.		Powell, Capel v. . . . .	743
<i>Judges.</i>			
Death of the Hon. T.			
Erskine . . . . .	538	R.	
<i>Queen's Counsel.</i>		Radloff, Mallan v. . . . .	588
John Bridge Aspinall . . . .	538	Ray, Clay v. . . . .	188
Metropolitan Railway Co., Barker		Read v. Edwards . . . . .	245
v. . . . .	785	Ringland v. Lowndes . . . . .	514
Mills v. Colchester (Mayor, &c.)	635	Robinson v. Collingwood . . . .	777
Mitcalfe v. Westaway . . . .	658	Ronneberg v. Falkland Islands	
Montgomerie, Berresford v. . .	379	Company . . . . .	1
Moon v. Hall . . . . .	760	Russell v. Niemann . . . . .	163
Mortimore, Naylor v. . . . .	207		
Moss, Turquand v. . . . .	15, 24	S.	
N.		St. Leonard's, Shoreditch (Vestry	
Naylor v. Mortimore . . . . .	207	of) v. Hughes . . . . .	137
Nicoll v. Greaves . . . . .	27	Salisbury, Marquis of, v. Glad-	
Niemann, Russell v. . . . .	163	stone . . . . .	843
Norwood, Dresser v. . . . .	466	Saunders v. Best . . . . .	731
Nothard v. Pepper . . . . .	39	———, Koebel v. . . . .	71
Nuttall, Edmondson v. . . . .	280	Schmidt, Podmore v. . . . .	725
———, Hill v. . . . .	262	Seymour, Bolckow v. . . . .	107
O.		Sharpe, Maugham v. . . . .	443
Oxford (Dean and Chapter of		Shoreditch (Vestry of) v. Hughes	137
Christchurch) v. Buckingham		Sparkes, In re . . . . .	727
(Duke) . . . . .	391	Stearine Kaarsen Fabrick Gonda	
P.		Co. v. Heintzmann . . . . .	56
Pearson v. Göschen . . . . .	352	Stokes, General Discount Com-	
		pany v. . . . .	765
		Sunderland (Churchwardens),	
		Wilson v. . . . .	694
		Swann, Joyce v. . . . .	84

## TABLE OF CASES REPORTED.

T.			PAGE
Taylor, app., Humphries, resp. . . . .	539	Westaway, Mitcalfe v. . . . .	658
Thomas v. Hunt . . . . .	183	Western Neilgherry Coffee, &co., Plantation Company, Inchbald v. . . . .	733
Tobin v. Harford . . . . .	528	Whiteley v. King . . . . .	756
Turquand v. Moss . . . . .	15, 24	Wilson v. Sunderland (Church- wardens) . . . . .	694
W.		Wood, Horwood v. . . . .	749
Walker v. Brogden . . . . .	571		

## TABLE OF CASES CITED.

### A.

	PAGE
<i>Acebal v. Levy</i> , 4 M. & Scott 217, 10 Bing. 376 . . . . .	94
<i>Ackroyd</i> , Ex parte, In re Munroe, 1 Mont. D. & De Gex 555 . . . . .	228, 234, 243
<i>Adams v. Broughton</i> , 2 Stra. 1078 . . . . .	285 n.
<i>Adkins v. Farrington</i> , 5 Hurlst. & N. 586 . . . . .	766, 772, 774
<i>Ainslie v. Medlycott</i> , 9 Ves. 13 . . . . .	565
<i>Allcard v. Wesson</i> , 7 Exch. 753 . . . . .	226, 230, 233, 241
<i>Andrewes v. Elliott</i> , 5 Ellis & B. 502 . . . . .	521, 525
———, (in error), 6 Ellis & B. 338 . . . . .	522
<i>Armory v. Delamirie</i> , 1 Stra. 505 . . . . .	664
<i>Armstrong v. Percy</i> , 5 Wend. 535 . . . . .	710 n.
<i>Arnold v. Jefferson</i> , 3 Salk. 248 . . . . .	257
<i>Ashcroft v. Morrin</i> , 4 M. & G. 450 . . . . .	105
<i>Atkinson v. Denby</i> , 6 Hurlst. & N. 778 . . . . .	191
———, 7 Hurlst. & N. 934 . . . . .	192
———, app., Sellers, resp., 5 C. B. N. S. 442 . . . . .	540, 543, 550
<i>Attack v. Bramwell</i> , 9 Jurist N. S. 892 . . . . .	287

### B.

<i>Ball v. Harris</i> , 4 Mylne & Cr. 264 . . . . .	150
<i>Bannerman v. White</i> , 10 C. B. N. S. 844 . . . . .	599 n., 721
<i>Barker v. Keat</i> , 2 Mad. 251 . . . . .	688
<i>Baron v. Martell</i> , 9 D. & R. 390 . . . . .	730 n.
<i>Barrs v. Jackson</i> , 1 Y. & C. C. C. 585 . . . . .	826
<i>Barton v. Wolliford</i> , Comberbach 57 . . . . .	176
<i>Barwis</i> , Ex parte, In re Strahan, 25 Law J., Bankruptcy 11 . . . . .	770, 772, 775
<i>Baylis v. Hayward</i> , 4 Ad. & E. 256, 5 N. & M. 613 . . . . .	189
——— v. Lawrence, 11 Ad. & E. 920, 3 P. & D. 526 . . . . .	605
<i>Beck v. Beverly</i> , 11 M. & W. 845 . . . . .	182
<i>Beckwith v. Shordike</i> , 1 Burr. 2092 . . . . .	259
<i>Behn v. Burness</i> , 32 Law J., Q. B. 204, 3 Best & Smith 76 . . . . .	599
<i>Bell v. Bromfield</i> , 15 East 364 . . . . .	808
——— v. Carstairs, 14 East 374 . . . . .	808
<i>Bennet</i> , Ex parte, 2 Atk. 527 . . . . .	19
<i>Bennett v. Benham</i> , 15 C. B. N. S. 616 . . . . .	434 n.
<i>Bentham v. Wiltshire</i> , 4 Madd. 49 . . . . .	150
<i>Bernardi v. Motteux</i> , 2 Dougl. 575 . . . . .	803, 806, 824, 827
<i>Betteley v. Stainsby</i> , 12 C. B. N. S. 477 . . . . .	773 n.
<i>Bevan v. Whitmore</i> , 15 C. B. N. S. 442 . . . . .	26
<i>Bingham v. Woodgate</i> , 1 Russ. & M. 32 . . . . .	401
<i>Birch v. Wright</i> , 1 T. R. 378, 382 . . . . .	409
<i>Birley v. Gladstone</i> , 3 M. & Selw. 205 . . . . .	371, 377
<i>Blades v. Higgs</i> , 12 C. B. N. S. 501 . . . . .	252, 254, 255
——— (in error), 13 C. B. N. S. 844 . . . . .	252
<i>Blasco v. Fletcher</i> , 4 C. B. N. S. 147 . . . . .	367

	PAGE
Blasdale v. Babcock, 1 J. R. 517 (American) . . . . .	710 n.
Blatchford, app., Cole, resp., 5 C. B. N. S. 514 . . . . .	687 n.
Blemmer Hassett v. Humberstone, Hutton 65, Sir W. Jones 42, Winch R. 66 . . . . .	401 n.
Blissett v. Tenant, 5 Scott 479, 4 N. C. 168 . . . . .	523, 526
Blyth v. Smith, 5 M. & G. 405, 6 Scott N. R. 360 . . . . .	11
Bonner, In re, 1 N. & M. 555, 4 B. & Ad. 811 . . . . .	730 n.
Bosden v. Thinne, Yelv. 40 . . . . .	711
Boulston's Case, 5 Co. Rep. 104 b . . . . .	257
Bourn v. Diggles, 2 Chitt. R. 311 . . . . .	202
Bourne v. Gatcliffe, 3 Scott N. R. 1, 3 M. & G. 643 . . . . .	385
—, 11 Clark. & F. 45, 2 Scott N. R. 604 . . . . .	385
Bowlston v. Hardy, Cro. Eliz. 547 . . . . .	257
Boyd v. Dubois, 3 Campb. 133 . . . . .	75, 78
— v. Robins, 4 C. B. N. S. 749 . . . . .	771
— (in error), 5 C. B. N. S. 597 . . . . .	771
Boydell v. Champneys, 2 M. & W. 433 . . . . .	181
Bradley v. Eyre, 11 M. & W. 432 . . . . .	189
— v. Urquhart, 11 M. & W. 456 . . . . .	189
Bradshaw and East and West India Docks and Birmingham Junction Railway Company, 12 C. B. 562 . . . . .	521
Brand v. Lisle, Yelv. 164 . . . . .	460
Brayshaw v. Eaton, 5 N. C. 231, 234, 7 Scott 180 . . . . .	562
Braythwaite v. Hitchcock, 10 M. & W. 494 . . . . .	328
Brierly v. Kendall, 17 Q. B. 937 . . . . .	283
Broom v. Hall, 7 C. B. N. S. 503 . . . . .	8
Brown, Ex parte, 21 Law J., M. C. 113 . . . . .	674 n.
—, In re, 27 Law J., Probate 20, 1 Swab. & Tr. 32 . . . . .	758
— v. Brown, 8 Ellis & B. 876 . . . . .	758
— v. Edgington, 2 Scott N. R. 496, 2 M. & G. 279 . . . . .	592, 719
— v. Giles, 1 Car. & P. 118 . . . . .	260
— v. North, 8 Exch. 1 . . . . .	106
Browne v. Hare, 4 Hurlst. & N. 822 . . . . .	62, 95, 100, 102
Buckmaster, app., Reynolds, resp., 13 C. B. 62 . . . . .	542 n.
Budd v. Fairmaner, 8 Bingh. 48, 1 M. & Scott 74 . . . . .	596, 599
Bull v. Clarke, 15 C. B. N. S. 851 . . . . .	82 n.
Burkingshaw v. Birmingham and Oxford Junction Railway Company, 5 Exch. 475 . . . . .	803, 806
Burley v. Stephens, 1 M. & W. 156 . . . . .	520, 525
Burnard, app., Haggis, resp., 14 C. B. N. S. 45 . . . . .	204
Burnett v. Lynch, 5 B. & C. 589, 8 D. & R. 368 . . . . .	461
Busk v. Davis, 2 M. & Selw. 403 . . . . .	64
Butler v. Ablewhite, 6 C. B. N. S. 740 . . . . .	434

## C.

Caledonian Railway Company v. Lockhart, 19 Court of Sessions Cases 527, 3 Macq. 808 . . . . .	522, 524, 525
Calvert v. Bovill, 7 T. R. 523 . . . . .	805, 824
Cameron v. Wynch, 2 Car. & K. 264 . . . . .	286
Campbell v. Prescott, 15 Ves. 503 . . . . .	692 n.
Carrington v. Taylor, 11 East 571 . . . . .	254
Cattley v. Arnold, 4 Johnson & H. 651 . . . . .	330 n.
Cawthron v. Trickett, 15 C. B. N. S. 754 . . . . .	172 n.
Chandler v. Lopus, Cro. Jac. 4 . . . . .	718
Chanter v. Hopkins, 4 M. & W. 399 . . . . .	591, 593, 596
Chapman v. Speller, 14 Q. B. 621 . . . . .	715, 722
Chappel v. Comfort, 10 C. B. N. S. 802 . . . . .	172 n.
Chappel v. Bray, 6 Hurlst. & N. 145 . . . . .	272, 277
Chapple v. Cooper, 13 M. & W. 252 . . . . .	561
Chinery v. Viall, 5 Hurlst. & N. 288 . . . . .	285
Christie v. Secretan, 8 T. R. 192 . . . . .	74, 75 n.
Churchward v. Studdy, 14 East 249 . . . . .	254

## TABLE OF CASES CITED.

xiii

	PAGE
Clapham v. Atkinson, 33 Law J., Q. B. 81 . . . . .	228
—, 10 Law Times, N. S. 908 . . . . .	228
Clark's Case, 2 Leon. 30 . . . . .	460
Clay v. Ray, 17 C. B. N. S. 188 . . . . .	182 n.
Cockshott v. Bennett, 2 T. R. 763 . . . . .	190, 191
Cogge v. Bernard, 2 Ld. Raym. 909, Com. 133, 1 Salk. 26, 3 Salk. 11, Holt 13 . . . . .	457, 460
Colchester (Mayor) v. Brooke, 7 Q. B. 339 . . . . .	654
— v. Seaber, 3 Burr. 1866, 1 W. Bl. 591 . . . . .	649 n.
Cooch v. Goodman, 2 Q. B. 580 . . . . .	457
Cooper v. Shepherd, 3 C. B. 272 . . . . .	286 n.
— v. Willomatt, 1 C. B. 672 . . . . .	686
Coose v. Neumegen, 9 M. & W. 290 . . . . .	523, 526
Cornfoot v. Fowke, 6 M. & W. 358 . . . . .	481
Couturier v. Hastie, 8 Exch. 40 . . . . .	99
—, 5 House of Lords Cases 673 . . . . .	99
Cowas-jee v. Thompson, 5 Moore's P. C. 165 . . . . .	63
Cowie v. Remfry, 5 Moore's P. C. 232 . . . . .	298 n., 307, 310
Cox v. Burbidge, 13 C. B. N. S. 433, 440 . . . . .	254
Craven v. Ryder, 6 Taunt. 433, 2 Marsh. 127 . . . . .	62, 63, 64
Cripps v. Hills, 5 Q. B. 606, D. & M. 545 . . . . .	564
Crocker v. Molineux, 3 C. & P. 470 . . . . .	32
Crosse v. Gardner, Carthew 90 . . . . .	709
Crossley v. Dixon, 8 Law T., N. S. 260 . . . . .	441
Culliford, Ex parte, 8 B. & C. 220 . . . . .	729
Cumber v. Wane, 1 Stra. 426, 1 Smith's Leading Cases, 5th edit. 295 . . . . .	228
Cumberland v. Planché, 1 Ad. & E. 580, 3 N. & M. 537 . . . . .	424, 425, 428
Curling v. Long, 1 Bos. & P. 634 . . . . .	367
Cuthbertson v. Irving, 4 Hurlst. & N. 742 . . . . .	407
Cutter v. Powell, 6 T. R. 320, 2 Smith's Leading Cases 1 . . . . .	736, 737, 738
Cutto v. Gilbert, 9 Moore's P. C. 143 . . . . .	758
Cutts v. Thodey, 13 Simons 206 . . . . .	153

## D.

Dalgleish v. Hodgson, 7 Bingh. 495, 5 M. & P. 407 . . . . .	799, 813, 824, 828
Dalmady v. Motteux, 1 T. R. 89 n. . . . .	810 n.
Dand v. Kingscote, 6 M. & W. 194, 197 . . . . .	666
Dann v. Spurrier, 3 Bos. & P. 399 . . . . .	329
Davies v. Price, 6 Law T., N. S. 713 . . . . .	519
—, (in error), 11 Law T., N. S. 203 . . . . .	527, 528
Davis, Ex parte, 26 Law J., M. C. 178 . . . . .	674 n.
Davis v. Jones, 17 C. B. 625 . . . . .	582, 583, 586, 587
Davison v. Gent, 1 Hurlst. & N. 744 . . . . .	405
Davys, app., Douglas, resp., 28 Law J., M. C. 193 . . . . .	674 n.
Dawson v. Wrench, 3 Exch. 359 . . . . .	272
Deane v. Clayton, 2 Marsh. 577, 582 . . . . .	259
Deering v. Farrington, 3 Keble 304 . . . . .	712
Defreeze v. Trumper, 1 Johns. U. S. R. 274 . . . . .	712
Demandray v. Metcalfe, Pre. Ch. 420, 2 Vern. 691 . . . . .	458 n.
Devison v. Ralphson, 1 Ventr. 366 . . . . .	718
Dewell v. Sanders, Cro. Jac. 490 . . . . .	257
Dickinson v. Stidolph, 11 C. B. N. S. 341, 357 . . . . .	758
Dimmock v. Allenby, 2 Marsh. 582 . . . . .	259
Di Sora (Duchess) v. Phillips, 33 Law J., Ch. 129 . . . . .	60
Dod v. Monger, 6 Mod. 215, Holt 416 . . . . .	326
Doe d. Burgess v. Thompson, 5 Ad. & E. 532, 1 N. & P. 215 . . . . .	406
— d. Gibbons v. Pott, 2 Dougl. 709 . . . . .	400, 402
— d. James v. Brawn, 5 B. & Ald. 243 . . . . .	779
— d. Jones v. Hughes, 6 Exch. 223 . . . . .	149, 152
— d. King v. Grafton, 18 Q. B. 496 . . . . .	326, 342
— d. Landsell v. Gower, 17 Q. B. 589 . . . . .	328, 329
— d. Meyrick v. Meyrick, 1 Cr. & J. 223 . . . . .	684
— d. Oliver, 2 Smith's Leading Cases 677 . . . . .	823, 826



	PAGE
Doe d. Parsley v. Day, 2 Q. B. 147, 156, 1 Gale & D. 493 . . . . .	687 n.
— d. Pitcher v. Donovan, 1 Taunt. 555 . . . . .	325, 341
— d. Rigge v. Bell, 5 T. R. 471 . . . . .	328, 329
— d. Webb v. Dixon, 9 East 15 . . . . .	329
Doggett v. Catterns, 17 C. B. N. S. 669 . . . . .	690 n.
Donne v. Martyr, 8 B. & C. 69, 2 M. & R. 98 . . . . .	705 n.
Durham and Sunderland Railway Company v. Walker, 2 Q. B. 940 . . . . .	666

## E.

Early v. Garrett, 9 B. & C. 932, 4 M. & R. 687 . . . . .	712, 719, 723
Edkins v. Freshney, 1 Lev. 102 . . . . .	711
Edward, 4 C. Rob. Adm. R. 68 . . . . .	815 n.
Edwards v. English, 7 Ellis & B. 564 . . . . .	456
Eland v. Eland, 4 Mylne & Cr. 428 . . . . .	151
Evans v. Powis, 1 Exch. 601 . . . . .	228

## F.

Faith v. East India Company, 1 B. & Ald. 630 . . . . .	374
Farwig v. Cockerton, 3 M. & W. 169 . . . . .	523, 526
Fawcus v. Sarsfield, 6 Ellis & B. 192 . . . . .	76
Finlay v. Seaton, 1 Taunt. 210 . . . . .	441
Finney v. Brownlow Cecil (Lord), 1 C. B. N. S. 117 . . . . .	181
Firebrass d. Symes v. Pennant, 2 Wils. 254 . . . . .	398
Fisher v. Bridges, 3 Ellis & B. 642 . . . . .	193
— v. Howard, 5 New Rep. 118 . . . . .	552 n.
— v. Ogle, 1 Campb. 418 . . . . .	806, 823, 826
— v. Wigg, 1 P. Wms. 17, 1 Ld. Raym. 627 . . . . .	400
Fitzherbert v. Mather, 1 T. R. 16 . . . . .	481
Flory v. Denny, 7 Exch. 581 . . . . .	455, 458, 462
Fomin v. Oswell, 3 Campb. 357, 1 M. & Selw. 393 . . . . .	808
Forbes v. Aspinall, 13 East 323 . . . . .	533, 536
— v. Peacock, 12 Simons 541 . . . . .	150
Forman v. Dawes, 11 M. & W. 730 . . . . .	439
Foster v. Colby, 3 Hurlst. & N. 705 . . . . .	369
Fouldes v. Willoughby, 8 M. & W. 540 . . . . .	291, 294
Fox v. Clifton, 5 Bingh. 776, 4 M. & P. 676 . . . . .	839, 840
Fragano v. Long, 4 B. & C. 219, 6 D. & R. 283 . . . . .	100
Franklin, 3 C. Rob. Adm. R. 217, 224 . . . . .	814, 815 n.
— v. Miller, 4 Ad. & E. 599 . . . . .	737, 739
— v. Neate, 13 M. & W. 481 . . . . .	455, 461
Freeman v. Cooke, 2 Exch. 654 . . . . .	839
French's Case, 4 Co. Rep. 31 b. . . . .	401
Frend v. Dennett, 4 C. B. N. S. 576 . . . . .	517
Furnis v. Leicester Cro. Jac. 474 . . . . .	711, 713

## G.

Garrard v. Tuck, 8 C. B. 231 . . . . .	408
Gas Light and Coke Company v. Turner, 5 N. C. 666, 7 Scott 779 . . . . .	808
(in error), 6 N. C. 334, 8 Scott 609 . . . . .	808
Gatliffe v. Bourne, 5 Scott 667, 4 N. C. 314 . . . . .	385
Geary v. Bearcroft, Carter 66 . . . . .	688
Geere v. Mace, 33 Law J., Exch. 50, 2 Hurlst. & Colt. 339 . . . . .	193
Geyer v. Aguilar, 7 T. R. 681, 695 . . . . .	823
Gibson v. Brand, 1 Webster's P. C. 630 . . . . .	187 n.
— v. Service, 5 Taunt. 431, 1 Marsh. 119 . . . . .	798
— v. Small, 4 House of Lords Cases 353, 384 . . . . .	76
Gill v. Scrivens, 7 T. R. 27 . . . . .	549
Gillard v. Brittan, 8 M. & W. 575 . . . . .	296
Gist v. Mason, 1 T. R. 88 . . . . .	810 n.
Gledstanes v. Allen, 12 C. B. 202 . . . . .	368 n.

# TABLE OF CASES CITED.

xv

	PAGE
Godden, <i>Ex parte</i> , <i>In re</i> Shettle, 1 De Gex, Jones & S. 260 . . . . .	15, 18, 19, 21, 22, 23, 24, 25
Goldsmid v. Hampton, 5 C. B. N. S. 94 . . . . .	180
Goodman, <i>Ex parte</i> , 3 Madd. 375 . . . . .	19
Gorslett v. Harris, 29 Law Times 75 . . . . .	434
Gorsling v. Carter, 1 Collier, C. C. 644 . . . . .	150, 152
Green v. Reed, 3 Fost. & Fin. 226 . . . . .	739
— v. Saddington, 7 Ellis & B. 503 . . . . .	582
Gregson v. Ruck, 4 Q. B. 737 . . . . .	307
Grissell v. Robinson, 3 N. C. 10, 3 Scott 329 . . . . .	564

## H.

Hall v. Conder, 2 C. B. N. S. 22, 40 . . . . .	709, 717, 722
Hamilton v. Watson, 12 Clark & F. 109 . . . . .	500, 501, 503, 504, 505
Hancock v. Austin, 14 C. B. N. S. 634 . . . . .	281 n., 291
Hannam v. Mockett, 2 B. & C. 934, 4 D. & R. 518 . . . . .	225
Hare v. Bickley, Plowd. 526 . . . . .	688
Hargreaves v. Michell, 6 Madd. 326 . . . . .	151
Harris v. Birch, 9 M. & W. 591 . . . . .	458
— v. Jays, Cro. Eliz. 699 . . . . .	406
— v. Rickeett, 4 Hurlst. & N. 1 . . . . .	582, 586, 587
Harvey v. Pocock, 11 M. & W. 740 . . . . .	290, 294
— v. Young, Yelv. 20 . . . . .	711
Hasset v. Hanson, Winch R. 66 . . . . .	401 n.
Hastie v. Courturier, 9 Exch. 102 . . . . .	99
Hatton v. Kean, 7 C. B. N. S. 268 . . . . .	430 n.
Haywood v. Fiatt, 8 C. & P. 59 . . . . .	560
Hazard v. Mare, 20 Law J., Exch. 97 . . . . .	237
Head v. Briscoe, 5 C. & P. 484, 2 L. J. N. S. C. P. 101 . . . . .	746, 747, 748, 749
Hern v. Nichols, 1 Salk. 289 . . . . .	841
Hide v. Newport, Moore 185 . . . . .	401
Hiern v. Mill, 14 Ves. 120 . . . . .	481
Hill v. Great Western Railway Company, 10 C. B. N. S. 148 . . . . .	82, 83
— v. Patten, 8 East 373 . . . . .	533
Holdsworth v. Wilson, 2 Best & Smith 480 . . . . .	516 n.
— (in error), 4 Best & Smith 1 . . . . .	516 n.
Holman v. Johnson, Cowp. 341 . . . . .	819
Holt v. Meddowcroft, 4 M. & Selw. 467 . . . . .	520, 523, 525
Hopkins v. Thomas, 7 C. B. N. S. 711 . . . . .	768
Horney v. Lushington, 15 East 46, 3 Campb. 85 . . . . .	808
Howard v. Shepherd, 9 C. B. 297 . . . . .	385
Howes v. Martin, 1 Esp. N. P. C. 162 . . . . .	11
Howton v. Frearson, 8 T. R. 50 . . . . .	665
Hoy v. Smithies, 22 Beavan 510 . . . . .	150, 160, 162
Hunt v. Hewitt, 7 Exch. 236 . . . . .	81
Hunter v. Parker, 7 M. & W. 332 . . . . .	229

## I.

Imina, 3 C. Rob. Adm. R. 168 . . . . .	820
--	-----

## J.

James v. Landon, Cro. Eliz. 36 . . . . .	407
Jameson v. Campbell, 5 B. & Ald. 250 . . . . .	227
Johnson v. Blenkinsopp, 5 Jurist 870 . . . . .	32, 35, 38
— v. Kennett, 6 Simons 384, 3 Mylne & K. 624 . . . . .	151
— v. Stear, 15 C. B. N. S. 330 . . . . .	284, 289, 455
Jones, <i>Ex parte</i> , 21 Law J., M. C. 116 . . . . .	674 n.
Jones v. Bright, 5 Bingh. 533, 3 M. & P. 155 . . . . .	592, 593
Jonge v. Tobias, 1 C. Rob. Adm. R. 329 . . . . .	815 n.
Josephs, <i>In re</i> , <i>Ex parte</i> Spyer, 32 Law J., Bankruptcy 62, 64 . . . . .	19, 22
Joyce v. Swann, 17 C. B. N. S. 84 . . . . .	63 n.

## K.

	PAGE
<i>Keble v. Hickeringill</i> , 11 East 574 n. . . . .	254, 257
<i>Keen v. Priest</i> , 4 Hurlst. & N. 236 . . . . .	288
<i>Kemp v. Westbrook</i> , 1 Ves. 278 . . . . .	458 n.
<i>Kern v. Deslandes</i> , 10 C. B. N. S. 205 . . . . .	365, 379
<i>Key v. Cotesworth</i> , 7 Exch. 595 . . . . .	106
<i>King v. Randall</i> , 14 C. B. N. S. 721 . . . . .	17, 18
<i>Kingston (Duchess's) Case</i> , 2 Smith's Leading Cases 692 . . . . .	807
<i>Kinnersley v. Mussen</i> , 5 Taunt. 264 . . . . .	228
<i>Kirchner v. Venus</i> , 12 Moore's P. C. 361 . . . . .	365, 368, 379

## L.

<i>Lacy v. Rhys</i> , 33 Law J., Q. B. 157 . . . . .	428, 431
<i>Lancashire Wagon Company v. Fitzhugh</i> , 6 Hurlst. & N. 502 . . . . .	455
<i>Lane's Case</i> , 2 Co. Rep. 16 b . . . . .	401
<i>Lane v. Debenham</i> , 17 Jurist 1005 . . . . .	153
<i>Langton v. Hughes</i> , 1 M. & Selw. 593 . . . . .	812
<i>Leakins v. Clissel</i> , 1 Siderfin 146 . . . . .	711
<i>Lee v. Bayes</i> , 18 C. B. 599 . . . . .	720 n.
— <i>v. Jones</i> , 14 C. B. N. S. 386 . . . . .	482
<i>Leigh v. Pendlebury</i> , 15 C. B. N. S. 815 . . . . .	20
<i>Le Neve v. Le Neve</i> , 2 Tudor's Cases in Equity 21 . . . . .	481
<i>Leonard v. Baker</i> , 15 M. & W. 202 . . . . .	181
<i>Lewis v. Peake</i> , 7 Taunt. 153 . . . . .	10
<i>Liford's Case</i> , 11 Co. Rep. 46 b . . . . .	666
<i>Lightfoot v. Tenant</i> , 1 Bos. & P. 599 . . . . .	812, 819
<i>Lilley v. Elwin</i> , 11 Q. B. 742 . . . . .	38
<i>Litchfield v. Ready</i> , 5 Exch. 939 . . . . .	686
<i>Lonsdale (Earl) v. Rigg</i> , 11 Exch. 679 . . . . .	254
<i>Lothian v. Henderson</i> , 3 Bos. & P. 499 . . . . .	822, 823, 826
<i>Louth v. Drummond</i> , Kingston Spring Assizes 1849 . . . . .	31, 38
<i>Lycett v. Tenant</i> , 4 N. C. 168, 5 Scott 479 . . . . .	523, 526
<i>Lyon v. Knowles</i> , 3 Best & Smith 556 . . . . .	421, 429, 431

## M.

<i>Maberly v. Titterton</i> , 7 M. & W. 540 . . . . .	441 n.
<i>M'Culloch v. Gregory</i> , 1 K. & J. 286 . . . . .	153
<i>Macdougall v. Paterson</i> , 11 C. B. 755 . . . . .	434
<i>Maddick v. Marshall</i> , 16 C. B. N. S. 387 . . . . .	835
<i>Mainwaring v. Brandon</i> , 8 Taunt. 202 . . . . .	10
<i>Markby</i> , In re, 4 Mylne & Cr. 484 . . . . .	330 n.
<i>Marriott v. Hampton</i> , 7 T. R. 269 . . . . .	191
<i>Marshall v. Rutton</i> , 8 T. R. 545, 548 . . . . .	747
— <i>v. York, Newcastle and Berwick Railway Company</i> , 11 C. B. 655 . . . . .	202 n.
<i>Martindale v. Falkner</i> , 2 C. B. 718 . . . . .	525
<i>Mason v. Keeling</i> , 1 Ld. Raym. 608 . . . . .	250, 254
<i>May</i> , Ex parte, 2 Best & Smith 426 . . . . .	702
<i>May v. Burdett</i> , 9 Q. B. 101 . . . . .	250
<i>Mayne v. Walter</i> , 2 Park Ins. 531 . . . . .	805
<i>Mears v. London and South Western Railway Co.</i> , 11 C. B. N. S. 850 . . . . .	455
<i>Medina v. Stoughton</i> , 1 Ld. Raym. 593, Salk. 210 . . . . .	711, 713, 724
<i>Melling v. Leak</i> , 16 C. B. 652 . . . . .	408, 414
<i>Middleton v. Croft</i> , Rep. t. Hardw. 399 . . . . .	746
<i>Mills v. Roebuck</i> , Marsh. Ins. 154, Park Ins. 400 (8th edit.) . . . . .	75 n.
<i>Milner v. Lord Harewood</i> , 18 Ves. 259 . . . . .	565
<i>Minter v. Williams</i> , 4 Ad. & E. 251, 4 N. & M. 647, 1 Webster's P. C. 135 . . . . .	186
<i>Mitten v. Faudrye</i> , Popham 161 . . . . .	259
<i>Moffatt v. Laurie</i> , 15 C. B. 583 . . . . .	737
<i>Monopolies</i> , Case of, 11 Co. Rep. 87 . . . . .	257
<i>Moon v. Raphael</i> , 2 N. C. 310 . . . . .	289, 293
<i>Mares v. Conham</i> , Owen 123 . . . . .	460

## TABLE OF CASES CITED.

xvii

	PAGE
Morgan, <i>Ex parte</i> , In re Woodhouse, 32 Law J., Bankruptcy 15	17, 18, 20, 23
— <i>v.</i> Abergavenny (Earl), 8 C. B. 768	253 n.
Morley <i>v.</i> Attenborough, 3 Exch. 500	709, 711, 715, 717, 718, 720, 721, 723, 725
— <i>v.</i> Cook, 2 Hare 106	153, 157
Mortimore's Case, Hetley 150	401
Mortimore, <i>Ex parte</i> , 30 Law J., Bankruptcy 17	212
Munroe, In re, <i>Ex parte</i> Ackroyd, 1 Mont. D. & De Gex 555	228, 234, 243
Murray <i>v.</i> Elliston, 5 B. & Ald. 657, 1 D. & R. 299	426
— <i>v.</i> Stair (Earl of), 2 B. & C. 82, 3 D. & R. 278	582

## N.

Neutralitet, 3 C. Rob. Adm. R. 295	815 n.
Newhall <i>v.</i> Wilkins, 17 Law T. 20	441
Newnham <i>v.</i> Bever, 8 C. B. 560	441 n.
Nicholl <i>v.</i> Greaves, 17 C. B. N. S. 27	348
North British Insurance Company <i>v.</i> Lloyd, 10 Exch. 523	495, 501, 503, 510
Nowlan <i>v.</i> Ablett, 2 C. M. & R. 54	29, 30, 31, 35

## O.

Oldershaw <i>v.</i> Holt, 12 Ad. & E. 590, 4 P. & D. 307	350
Oliver <i>v.</i> Cowley, Guildhall, T. T. 1765	74, 75 n., 77
Ollivant <i>v.</i> Bayley, 5 Q. B. 288, 1 D. & Meriv. 373	591, 593, 596, 599
Oppenheim <i>v.</i> Russell, 3 Bos. & P. 42	367
Omrod <i>v.</i> Huth, 14 M. & W. 664	714, 717
Oswell <i>v.</i> Vigne, 15 East 70	808
Owen <i>v.</i> Homan, 3 M'N. & G. 378	495

## P.

Paget <i>v.</i> Wilkinson, Tr. 8 W. 3	718
Palmer <i>v.</i> Metropolitan Railway Company, 31 Law J., Q. B. 259	523, 525
Parker <i>v.</i> Ibbetson, 4 C. B. N. S. 346	348
— <i>v.</i> Ince, 4 Hurlst. & N. 53	771, 774
— <i>v.</i> Marchant, 1 Y. & C., C. C. 304	692 n.
— <i>d.</i> Walker <i>v.</i> Constable, 3 Wils. 25	334 n.
Parkinson <i>v.</i> Lee, 2 East 314	716 n.
Parr, <i>Ex parte</i> , 1 Rose B. C. 76	19
Parsons <i>v.</i> Sexton, 4 C. B. 899	595, 600
Pasley <i>v.</i> Freeman, 3 T. R. 51	709, 711, 713, 714
Patten <i>v.</i> Poulton, 1 Swab. & Tr. 55, 27 Law J., Probate 41	757, 758
Payler <i>v.</i> Homersham, 4 M. & Selw. 423	684, 691
Pennell <i>v.</i> Woodburn, 7 C. & P. 117	10
Percival <i>v.</i> Stamp, 9 Exch. 167	290 n.
Phillips <i>v.</i> Rodie, 15 East 547	371, 377
Pickard <i>v.</i> Sears, 6 Ad. & E. 469, 2 N. & P. 488	839
Pickering <i>v.</i> Buckley, Styles 132	175
Pidcock <i>v.</i> Bishop, 3 B. & C. 605, 5 D. & R. 505	504
Pigott <i>v.</i> Cubley, 15 C. B. N. S. 701	289 n., 455
Pitt <i>v.</i> Moore, 2 Show. 156	399
Planché <i>v.</i> Colburn, 8 Bingh. 14, 1 M. & Scott 51	735, 736, 737, 738, 740
Pollard <i>v.</i> Bell, 8 T. R. 434	804, 827
Pomfret <i>v.</i> Ricroft, 1 Wms. Saund. 323 (m)	666
Portman <i>v.</i> Willis, Cro. Eliz. 386	409
Powell <i>v.</i> Eason, 8 Bingh. 23, 1 M. & Scott 68	180
Prescott <i>v.</i> Union Insurance Company, 1 Wharton (American) 399	75 n.
Prickett <i>v.</i> Badger, 1 C. B. N. S. 296	736, 737, 739
Prideaux <i>v.</i> Bunnett, 1 C. B. N. S. 613	593
Pym <i>v.</i> Campbell, 6 Ellis & B. 370	581, 583, 587

## R.

Railton <i>v.</i> Matthews, 10 Clark & F. 935	499, 500
Rainsford <i>v.</i> Fenwick, Carter 215	562
C. B. N. S., VOL. XVII.—2	

	PAGE
Ranger, 6 C. Rob. Adm. R. 125	815 n.
Ratliffe v. Davies, Cro. Jac. 244, Noy 137, Yelv. 179, 1 Bulstr. 29	455, 458 n., 460
Rawlings v. Jennings, 13 Ves. 39	684, 691
Reade v. Conquest, 9 C. B. N. S. 755	426 n.
—, 11 C. B. N. S. 479	426 n.
Reeve and Downes, P. 15 Jac., B. R.	259 n.
Reeves v. Capper, 5 N. C. 136, 6 Scott 877	455
Regina v. Kingston (Justices), Ellis, B. & E. 256	702
— v. Pratt, 4 Ellis & B. 860	258, 259
Rex v. Barwick, 7 T. R. 33	703
— v. Fauntleroy, 2 Bingh. 413, 10 J. B. Moore 1	228
— v. Hall, 1 B. & C. 123, 136, 2 D. & R. 241	704
— v. Ivens, 7 C. & P. 242	540, 543 n., 545
— v. London (Mayor, &c.), 1 Show. 274, 180	650
— v. Mashiter, 6 Ad. & E. 153, 1 Nev. & P. 314	705 n.
— v. Mellor (Inhabitants), 2 East 189	666
— v. Pasmore, 3 T. R. 199	649
— v. Poynder, 1 B. & C. 178, 2 D. & R. 258	703 n.
— v. Pratten, 6 T. R. 559	549
— v. Tardebigg, 1 East 528	666
Reynell v. Lewis, 15 M. & W. 517	838
Richardson v. Marine Insurance Company, 6 Mass. R. 102, 103	811 n.
Rickman v. Carstairs, 5 B. & Ad. 651	533, 536
Rigg v. Lonsdale (Earl), 1 Hurlst. & N. 923	252, 258
Rigge v. Parkinson 4 Hurlst. & N. 9	593
Right d. Flower v. Darby, 1 T. R. 159	334, 338
Ringer v. Cann, 3 M. & W. 343	683, 688, 690, 692, 693
Ringland v. Lowndes, 15 C. B. N. S. 173	516 n.
Roberts v. Kuffin, 2 Atk. 112	684
Robinson v. Lowwater, 17 Beavan 592	149, 152
—, 5 Gex, M'N. & G. 272	151, 152
Rogers v. Brenton, 10 Q. B. 26	646
— v. Hadley, 2 Hurlst. & Colt. 227	120
Ronneberg v. Falkland Islands Company, 17 C. B. N. S. 1	203 n.
Ross v. Bramsted, 2 Roll. R. 439	460
Reus v. Arters, Co. Rep. 24	406
Ruck v. Hatfield, 5 B. & Ald. 632	63
Russell v. Briant, 8 C. B. 838	421, 429
— v. Thornton, 6 Hurlst. & N. 140	519
Rutland (Countess's) Case, Rol. Abr. <i>Action sur Case</i> (L.)	292
Ryall v. Rowles, 1 Ves. 348, 1 Atk. 165	258, 711
Ryan v. Clark, 14 Q. B. 65	687, 691

## S.

St. Aubyn v. St. Aubyn, 1 Dr. & Smale 611	330 n.
St. Paul v. Dudley and Ward, 15 Ves. 167	400
Saloucci v. Woodmass, Park Ins. 362	806, 807
Santissima Trinidad, 7 Wheaton R. 283	811 n.
Sarah Christina, 1 Rob. Adm. R. 237	814
Saunders v. Best, 17 C. B. N. S. 771 n.	769 n.
— v. Saunders, 6 Eccl. & Mar. Cas. 518	758
Seaman v. Fonereau, 2 Stra. 1183	481
Seare v. Prentice, 8 East 348	203 n.
Semayne's Case, 5 Co. Rep. 91 a, Cro. Eliz. 908, Moor 668	290
Sewell, app., Taylor, resp., 7 C. B. N. S. 160	674 n.
Shand v. Sanderson, 4 Hurlst. & N. 381	365, 370, 379
Shawe v. Felton, 2 East 109	533, 536
Shepherd v. Conquest, 17 C. B. 427	424
— v. Pybus, 3 M. & G. 878, 4 Scott N. R. 434	592
Sherratt v. North Staffordshire Railway Company, 2 Phill. 475	521
Shettle, In re, Ex parte Godden, 1 De Gex, Jones & S. 260	15, 18, 19, 21, 22, 23, 24, 25
Shiells v. Blackburne, 1 H. Bl. 158	203, 206

## TABLE OF CASES CITED.

xix

	PAGE
<i>Sichel v. Borch</i> , 2 Hurlst. & Colt. 954 . . . . .	752
<i>Siewewright v. Archibald</i> , 17 Q. B. 103 . . . . .	308 n.
<i>Simpson v. Lamb</i> , 17 C. B. 603 . . . . .	739
<i>Sims v. Marryat</i> , 17 Q. B. 281, 290 . . . . .	715, 723
<i>Slatterie v. Pooley</i> , 6 M. & W. 664 . . . . .	272, 278
<i>Smith v. Cuff</i> , 6 M. & Selw. 160 . . . . .	190
— <i>v. Gibson</i> , Peake's Add. Cas. 52 . . . . .	564
— <i>v. Gosw.</i> , 1 Campb. 282 . . . . .	367
— <i>v. Scotland (Bank of)</i> , 1 Dow 273 . . . . .	504, 506
<i>Snell v. Finch</i> , 13 C. B. N. S. 65 . . . . .	413
<i>Sora (Duchess di) v. Phillips</i> , 33 Law J., Ch. 129 . . . . .	60
<i>South Staffordshire Railway Company v. Burnside</i> , 5 Exch. 129 . . . . .	767
<i>Sprigwell v. Allen</i> , Aleyn 91 . . . . .	712, 718
<i>Spyer, Ex parte</i> , In re Josephs, 32 Law J., Bankruptcy 62, 64 . . . . .	19, 22
<i>Stadt Embden</i> , 1 C. Rob. Adm. R. 26 . . . . .	815 n.
<i>Staniland v. Ludlam</i> , 4 B. & C. 889, 7 D. & R. 484 . . . . .	439 n.
<i>Startup v. Macdonald</i> , 2 Scott N. R. 485 . . . . .	386
(in error), 7 Scott N. R. 269, 6 M. & G. 593 . . . . .	386
<i>Steel v. Lacy</i> , 3 Taunt. 285 . . . . .	808
<i>Steer v. Crowley</i> , 14 C. B. N. S. 337 . . . . .	156, 162
<i>Stevenson v. Newnham</i> , 13 C. B. N. S. 285, 302 . . . . .	192
<i>Stowell v. Robinson</i> , 3 N. C. 928, 5 Scott 196 . . . . .	156
<i>Strahan, In re, Ex parte Barwis</i> , 25 Law J., Bankruptcy 11 . . . . .	770, 772, 775
<i>Street v. Blay</i> , 2 B. & Ad. 456 . . . . .	596
<i>Stroughill v. Anstey</i> , 1 De Gex, M'N. & G. 652 . . . . .	151
<i>Stuart v. Wilkins</i> , Dougl. 18 . . . . .	716 n.
<i>Surrey v. Piggot</i> , Latch 153 . . . . .	665
<i>Sutton v. Moody</i> , 1 Ld. Raym. 250, 2 Salk. 556, 3 Salk. 290, 5 Mod. 375, 12 Mod. 144, Comb. 458, Comyns 34, Holt 608 . . . . .	253, 260
<i>Swans, Case of</i> , 7 Co. Rep. 15 b, 17 b . . . . .	252
<i>Syeds v. Hay</i> , 4 T. R. 260 . . . . .	385

## T.

<i>Tanner v. Smith</i> , 10 Simons 410 . . . . .	153, 157
<i>Taylor, app., Humphreys, resp.</i> , 18 C. B. N. S. 429 . . . . .	540, 544, 545, 546, 550
<i>Tennant v. Cumberland</i> , 23 Justice of Peace 51 . . . . .	540, 546
<i>Thames Ironworks Co. v. Patent Derrick Co.</i> , 1 Johnson & H. 93 . . . . .	458 n.
<i>Thompson v. Hopper</i> , 6 Ellis & B. 172 . . . . .	76
— <i>v. Robson</i> , 2 Hurlst. & N. 412 . . . . .	81
— <i>v. Small</i> , 1 C. B. 328 . . . . .	367
<i>Throgmorton d. Wandley v. Whelpdale</i> , Bul. N. P. 96 . . . . .	334 n.
<i>Thursby v. Plant</i> , 1 Wms. Saund. 233 b, n. (d) . . . . .	271
<i>Tindall v. Bell</i> , 11 M. & W. 228 . . . . .	8, 9, 10, 13
<i>Tobin v. Harford</i> , 13 C. B. N. S. 791 . . . . .	528
<i>Todd v. Kerrioh</i> , 8 Exch. 151 . . . . .	30, 38
<i>Took v. Tuck</i> , 4 Bingh. 224, 12 J. B. Moore 435 . . . . .	192
<i>Trent v. Hunt</i> , 9 Exch. 14 . . . . .	413
<i>Turner v. Cameron's Coalbrook Steam Coal Co.</i> , 5 Exch. 932 . . . . .	686, 688
— <i>v. Hoole, Dowl. &amp; R. N. P. C. 27</i> . . . . .	191
— <i>v. Liverpool Docks (Trustees)</i> , 6 Exch. 543 . . . . .	62, 96, 99, 106
— <i>v. Trisby</i> , 1 Stra. 168 . . . . .	564
<i>Tyerman v. Smith</i> , 6 Ellis & B. 719 . . . . .	521, 524
<i>Tyson v. Smith</i> , 6 Ad. & E. 745, 1 N. & P. 784 . . . . .	645 n.
(in error), 9 Ad. & E. 406, 1 P. & D. 307 . . . . .	645, 646

## U.

<i>Underhill v. Devereux</i> , 2 Wms. Saund. 72 dd . . . . .	189
--	-----

## V.

<i>Van Casteel v. Booker</i> , 2 Exch. 691 . . . . .	96, 99, 106
<i>Vanderzee v. Willis</i> , 3 Bro. 21 . . . . .	458 n.
<i>Van Sandau v. Corsbie</i> , 3 B. & Ald. 13 . . . . .	227, 241

W.		PAGE
Wait v. Baker, 2 Exch. 1	62, 96, 97, 100,	102
Wakeford's Case, 1 Leon. 102		401
Walker's Case, 3 Co. Rep. 22 a		719
Walker v. Aston, 14 Simons 87		151
—— v. Hatton, 10 M. & W. 255		10
—— v. Smalwood, Ambler 676		150
Wallis v. Littell, 11 C. B. N. S. 369		583, 586
Walter v. Smith, 5 B. & Ald. 439, 1 D. & R. 1		458 n.
Walton v. Lavater, 8 C. B. N. S. 162		185, 187
Warberg v. Tucker, 5 Ellis & B. 384		731
—— (in error), E. B. & E. 914	731, 769,	771
Watson v. Swann, 11 C. B. N. S. 756		86 n.
Waymell v. Reed, 5 T. R. 599		812
Wedderburn v. Bell, 1 Campb. 1		74
Wegener v. Smith, 15 C. B. 235		172 n.
Welch v. Phillips, 1 Moore's P. C. 299, 302		758
Wesson v. Allcard, 8 Exch. 260	226, 230, 233,	241
Whaley v. Laing, 26 Law J., Exch. 327, 2 Hurlst. & N. 476		664
Wharram v. Wharram, 32 Law J., Probate 75		758, 759
Wharton v. Mackenzie, 5 Q. B. 606, D. & M. 545		564
Wheeler v. Montefiore, 2 Q. B. 133		688
White v. Parkin, 12 East 578		581
Whitehouse v. Frost, 12 East 621		64
Whitstable (Fishery) v. Gann, 11 C. B. N. S. 387		646 n.
—— (in error), 13 C. B. N. S. 853		646 n.
Wilde v. Fort, 4 Taunt. 334		156
Williams v. Archer, 5 C. B. 318	293, 289 n.	
—— v. Bosanquet, 1 Brod. & B. 238, 3 J. B. Moore 500		687
—— v. Bryant, 5 M. & W. 447		456
—— v. Burrell, 1 C. B. 402		11
—— v. Jones, 7 Ecol. & Mar. Cas. 106		758
Williamson v. Allison, 2 East 446	712, 718	
Wilson v. Allen, 1 Jac. & W. 611		401
—— v. Brett, 11 M. & W. 113		204
—— v. Ray, 10 Ad. & E. 82, 2 P. & D. 253		190
Withers v. Reynolds, 2 B. & Ad. 882	737, 738	
Withorn, app., Thomas, resp., 8 Scott N. R. 783, 7 M. & G. 1, 1 Lutw. Reg. Cas. 125		703 n.
Wood v. Leadbitter, 13 M. & W. 838, 844		664
Woodhouse, In re, Ex parte Morgan, 32 Law J., Bankruptcy 15	17, 18, 20,	23
Woolley v. Pole, 14 C. B. N. S. 538		82
Worsley v. Scarborough (Earl), 3 Atk. 392		481
Wrightup v. Chamberlain, 7 Scott 598		11
Wyld v. Hopkins, 15 M. & W. 517		838

## Y.

Young v. Winter, 16 C. B. 401	731, 769, 771
-------------------------------	---------------

## TABLE OF STATUTES CITED.

HENRY VIII.	PAGE
21, c. 11. Restitution . . . . .	713
22, c. 5. Statute of Bridges: inhabitants . . . . .	703, 704
24, c. 10. Destruction of crows and rooks . . . . .	257
25, c. 11. To avoid destroying wild fowl . . . . .	257
<b>ELIZABETH.</b>	
8, c. 15. Game . . . . .	257
43, c. 2. Poor-rate: inhabitants . . . . .	704
<b>WILLIAM III.</b>	
7 & 8, c. 6. Church-rate . . . . .	702
<b>GEORGE I.</b>	
7, c. 31, s. 1. Insolvent: contingent liability . . . . .	767
<b>GEORGE II.</b>	
4, c. 28, s. 1. Double value . . . . .	687 n.
26, c. 19, s. 15. Merchant Shipping Act . . . . .	45
31, c. 71. Colchester: Colne Fishery Act . . . . .	636
<b>GEORGE III.</b>	
13, c. 63, s. 44. Indian Mandamus Act . . . . .	44
32, c. 60. Libel . . . . .	605
39 & 40, c. 99, s. 17. Pawnbroker: sale of pledges . . . . .	722 n.
41, c. 109. Enclosure act . . . . .	606
48, c. cx., s. 52. Wolverhampton court of requests acts . . . . .	439
52, c. 93, Sched. C., No. 1. Assessed tax acts . . . . .	33
53, c. 127. Church-rate . . . . .	702
57, c. xxix. Michael Angelo Taylor's Act . . . . .	625
58, c. 69. Sturges Bourne's Act . . . . .	702
<b>GEORGE IV.</b>	
6, c. 16, ss. 51, 56. Bankrupt: contingent debt or liability . . . . .	767
7, c. 46. Public companies . . . . .	208
c. 57, ss. 10, 46. Insolvent: discharge . . . . .	180, 181
<b>1. GEORGE IV. &amp; 1 WILLIAM IV.</b>	
c. 47, s. 12. Conveyance by tenant for life . . . . .	151
<b>WILLIAM IV.</b>	
1 & 2, c. 32, s. 30. Trespass in pursuit of game . . . . .	258
2, c. 45, s. 27. Reform Act: qualification . . . . .	703
3 & 4, c. 15, s. 2. Dramatic copyright . . . . .	418
4 & 5, c. 22, s. 2. Apportionment of rent . . . . .	315, 340, 350
5 & 6, c. 74. Church-rate . . . . .	698, 699
	(xxi)



VICTORIA.	PAGE
1 & 2, c. 110, s. 75. Insolvent: discharge . . . . .	178
2 & 3, c. 47, s. 42. Victualler: Sunday trading . . . . .	552 n.
s. 60. Metropolitan Police Act . . . . .	626, 628
5 & 6, c. 45, s. 20. Dramatic copyright . . . . .	418
c. 85, s. 3. Patent Act: treble costs . . . . .	438 n.
c. 97. Double and treble costs . . . . .	439 n.
7 & 8, c. 113. Public companies . . . . .	208
8 & 9, c. vii. Nottingham Enclosure Act . . . . .	606
c. 18, s. 68. Lands Clauses Consolidation Act: compensation for lands taken . . . . .	785
c. 106, s. 3. Lease . . . . .	312
c. 108. Gaming . . . . .	671
9 & 10, c. 99, s. 16. Merchant Shipping Act . . . . .	45
11 & 12, c. 43, s. 5. Aiding and abetting . . . . .	553 n.
s. 14. Summary Convictions Act . . . . .	545
c. 49, s. 1. Ale-house: Sunday trading . . . . .	539
c. 63, ss. 124-126. Public Health Act 1848: arbitration . . . . .	514
12 & 13, c. 106, s. 178. Bankrupt: contingent liability . . . . .	751, 765
ss. 211, &c. Bankrupt: deed of arrangement . . . . .	21, 207
15 & 16, c. 54, s. 4. Costs: cause triable in a county court . . . . .	432
c. 76, s. 18. Common Law Procedure Act 1852: writ for service abroad . . . . .	749
c. 83, s. 35. Letters-patent: registration of probate . . . . .	755
s. 43. Patent Law Amendment Act: "full costs" . . . . .	435
16 & 17, c. 90, Sched. Assessed tax act . . . . .	33
c. 119, s. 5. Betting-House Act . . . . .	669
17 & 18, c. 36. Bill of Sale . . . . .	443, 678, 777
c. 79. Ale-house: Sunday trading . . . . .	533 n.
c. 104, ss. 448, 449. Merchant Shipping Act: examination by receiver of wrecks . . . . .	39
c. 125, s. 3. Common Law Procedure Act 1854: compulsory re- ference . . . . .	521
s. 50. Common Law Procedure Act 1854: inspection . . . . .	80
18 & 19, c. 43, s. 1. Marriage contract: infant . . . . .	565
c. 118. Ale-house: Sunday trading . . . . .	543 n.
c. 120. Metropolis Local Management Act . . . . .	631 n.
c. 121, s. 8. Nuisance Removal Act . . . . .	626, 628
19 & 20, c. 47, Table B. Joint Stock Companies Act . . . . .	765, 769
c. 112. Metropolis Local Management Act . . . . .	631 n.
20 & 21, c. 14. Joint Stock Company: calls . . . . .	765
c. 60. Joint Stock Company: calls . . . . .	773
c. 85, ss. 25, 26. Divorce: torts by wife . . . . .	743
21 & 22, c. 104. Metropolis Local Management Act . . . . .	631 n.
24 & 25, c. 134, ss. 153, 154. Bankrupt: contingent liability,—premiums on a policy . . . . .	731, 769
s. 161. Bankrupt: debts provable . . . . .	766
s. 192. Bankrupt: composition deed . . . . .	15
25 & 26, c. 63, s. 67. Merchant Shipping Act Amendment Act 1862 . . . . .	379
c. 89. Companies Regulation Act . . . . .	769
c. 102. Metropolis Management Act: nuisance . . . . .	625

## ABRIDGMENTS.

	PAGE
Bacon's Abridgment, <i>Actions on the Case</i> (E) . . . . .	716 n.
_____, <i>Baron and Feme</i> (L) . . . . .	745, 746, 747
_____, <i>Grants</i> (C) . . . . .	456
Comyns's Digest, <i>Baron and Feme</i> (Y) . . . . .	745
_____, <i>Chimin</i> (D. 2) . . . . .	665
_____, <i>Common</i> (F. 2) . . . . .	663
_____, <i>Copyhold</i> (F. 8) . . . . .	400
_____, <i>Fait</i> (E. 3) . . . . .	456
_____, <i>Enfant</i> (B. 5) . . . . .	564
_____, <i>Mortgage</i> (B.) . . . . .	458 n.
_____, <i>Trespass</i> (B. 3) . . . . .	688
_____, <i>Viscount</i> (B. 1) . . . . .	779
Rolle's Abridgment, <i>Action sur Case</i> (L.) . . . . .	292
_____, Vol. 2, p. 248, pl. 11 . . . . .	176
_____, p. 566, pl. 1 . . . . .	259
Viner's Abridgment, <i>Copyhold</i> (N. 1) pl. 8 . . . . .	410, 412

---

## YEAR BOOKS.

5 H. 7, fo. 1 . . . . .	455, 460
9 E. 4, fo. 25 . . . . .	455
17 E. 3, fo. 45 b, pl. 1 . . . . .	293
36 E. 3, Bar. 188 . . . . .	355
10 E. 4, fo. 14 . . . . .	253
18 E. 4, fo. 8 . . . . .	253
20 E. 4, fo. 10 b . . . . .	251
12 H. 8, fo. 4 . . . . .	253
13 H. 8, fo. 15 b . . . . .	336 n.
14 H. 8, fo. 1 b . . . . .	253

---

## RULE OF COURT.

Hilary Term, 1862. Special cases . . . . .	409 n.
--	--------

---

## MAXIMS.

<i>Actio personalis moritur cum persona</i> . . . . .	747
<i>Benignæ faciendiæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat</i> . . . . .	162 n.
<i>Expressio eorum quæ tacitè insunt nihil operatur</i> . . . . .	103
<i>Non potest adduci exceptio ejusdem rei cujus petitur dissolutio</i> . . . . .	240



CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF COMMON PLEAS,  
IN  
Trinity Term & Vacation,

IN THE  
TWENTY-SEVENTH YEAR OF THE REIGN OF VICTORIA. 1864.

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The Judges who usually sat in banco in the Term, were—

ERLE, C. J.,	WILLES, J., and
WILLIAMS, J.,	BYLES, J.:

And, in the Vacation,

WILLIAMS, J.,	BYLES, J., and
WILLES, J.,	KEATING, J.

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RONNEBERG and Others *v.* THE FALKLAND ISLANDS  
COMPANY. *May 26.*

Gunpowder was shipped for Valparaiso on board a vessel chartered on a voyage to that port, with liberty to touch and stay at the Falkland Islands. On the arrival of the vessel at Port Stanley, where the captain had goods to unload for the defendants, it was found that by the regulations of the port it would be necessary to land and store the powder before the vessel could enter the harbour. To avoid the inconvenience and expense of this, the captain accepted the offer of the agent of the defendants of the use of a vessel belonging to them, called the *Fairy*, in which to place the powder during his stay at Port Stanley. The defendants' agent afterwards requiring the *Fairy* for another purpose, without the consent of the captain transhipped the powder to a half-decked vessel called the *Lilly*, which the jury found to be an unsafe and improper vessel for the purpose. Whilst the *Lilly* was anchored outside the harbour, a storm arose and she was sunk, and the powder lost:—Held, that the defendants were responsible for the value, for that they were either trespassers in removing the powder without the captain's consent, or bailees who had been guilty of want of reasonable care.

On the arrival of the ship at Valparaiso, the consignees of the powder demanded it from the captain, and, not obtaining it, took proceedings against the ship, which the captain unsuccessfully resisted, being ultimately compelled to pay the consignees the value of the powder and the costs:—Held, that the owners of the ship could not claim these costs from the defendants, they not being a necessary consequence of their wrongful act.

THE first count of the declaration stated that the plaintiffs intrusted to the defendants, and the defendants received from the plaintiffs,

\*2] certain goods, to wit, four hundred kegs of gunpowder, to be by the \*defendants safely and securely kept and stowed in a certain ship of the defendants called the Fairy, upon certain terms then agreed upon between the plaintiffs and the defendants. Averment, that, before action brought, all things had happened and all times had elapsed necessary to entitle the plaintiffs to the performance by the defendants of the terms of the said bailment, and to sue the defendants for the breaches thereof thereafter mentioned: Breach, that the defendants did not safely or securely keep or store the said gunpowder, agreeably to the terms of the said bailment, but therein made default; and that the defendants, further disregarding their duty under the said bailment, while they had the said gunpowder in their care, wrongfully and without the knowledge or consent of the plaintiffs, removed the said gunpowder from the said ship Fairy, and placed the same in another and different vessel, and by reason thereof the said gunpowder became wholly lost to the plaintiffs.

The second count stated that the plaintiffs intrusted and delivered to the defendants certain gunpowder, to be taken care of by the defendants for the plaintiffs, upon certain terms agreed upon between the plaintiffs and the defendants in that behalf, and, amongst others, upon the terms that the defendants should use due and proper care and diligence in the premises: Averment, that, although all things had happened and all times had elapsed necessary to entitle the plaintiffs to sue the defendants for the breach of duty thereafter mentioned: Breach, that the defendants did not use due and proper care or diligence in the premises, but conducted themselves so contrary to the said terms, and so carelessly and negligently and improperly therein, that the said gunpowder was wholly lost: and the plaintiffs said, that, \*3] by reason of the said several premises, the plaintiffs had been entirely \*deprived of the said goods, and had incurred and become liable to pay, and had paid, large sums of money by way of damage to the owners of the said goods, *and were compelled to pay the said parties their costs of obtaining the said damages, and had thereby incurred heavy costs themselves in and about defending themselves from the claim of the said parties*, and by means of the premises the plaintiffs had been and were otherwise damnified.

The declaration also contained counts for money paid, interest, and money found due upon accounts stated.

The defendants traversed the several allegations in the first and second counts of the declaration, and to the common counts pleaded, a set-off for the use of a certain warehouse and store, and for money paid, &c. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after last Hilary Term. The facts which appeared in evidence were as follows:—The plaintiffs were the owners of a vessel called the Johanna Obiffa, which in March, 1862, was chartered by Messrs. Smith & Gregory, merchants in London, for a voyage to Valparaiso, with liberty to touch at Port Stanley, in the Falkland Islands, with a general cargo, amongst which were four hundred kegs of gunpowder consigned to Messrs. Allsop, at Valparaiso. The ship sailed on the 25th of April, 1862, and arrived at Port Stanley on the 25th of July. Having powder on board, the vessel was not permitted,

according to the regulations of the port, to proceed to the ordinary landing place for the purpose of landing some goods which she had for the defendants; and, as it would be expensive to warehouse the powder, the captain accepted the offer of the defendants' agent, Lane, to lend him a vessel of theirs called the *Fairy*, a decked vessel [\*4 of small burthen, in which the powder might be stowed and left outside the harbour. Whilst the *Johanna Ohiffa* was in the harbour unloading the goods consigned to the defendants, Lane, having occasion to use the *Fairy* for another purpose, without the consent of the captain, removed the powder from her into a half-decked boat (also belonging to the defendants) called the *Lily*, and, a gale coming on, the *Lily*, with the powder on board, sank. Some of the powder was got up, but in a damaged state, and the captain refused to take it on board.

On the arrival of the *Johanna Ohiffa* at Valparaiso, the consignees of the powder, Messrs. Allsop, not finding the powder on board, instituted proceedings in the Chancery there, and arrested the ship. The captain appeared, and judgment was pronounced against him, and he was compelled to raise the amount (312*l.*) incurring expenses to the extent of 99*l.* 12*s.* for costs and commission. The proceedings in the Spanish court were put in.

On the part of the defendants, it was submitted that they were not bailees, but that the powder never ceased to be in the possession or under the control of the captain of the *Johanna Ohiffa*; and that, assuming they were bailees, the captain was not justified in offering any resistance to the proceedings against him at Valparaiso at the suit of the consignees, and that the defendants at all events could not be charged with the expenses of those proceedings.

His Lordship left it to the jury to say whether or not the *Lily* was a proper vessel in which to store the powder, and whether the captain of the *Johanna Ohiffa* had consented to its removal from the *Fairy*; and he intimated an opinion that the plaintiffs might be entitled to recover the costs incurred at Valparaiso, if the jury should [\*5 think that the captain, in doing as \*he did, acted as a prudent and reasonable man would have acted under the circumstances.

The jury found that the *Lily* was not a safe and proper vessel, and that the captain knew of the removal of the powder, but did not assent to it.

A verdict was taken for the plaintiffs for 402*l.* 12*s.*, leave being reserved to the defendants to reduce the same by the amount of the costs incurred at Valparaiso.

*Karslake*, Q. C., in Easter Term, moved accordingly.—He submitted that the captain, having no defence, ought at once to have acquiesced in the demand of Messrs. Allsop: and he further contended that the defendants were not bailees and therefore not responsible in any degree for the safe keeping of the powder; that the captain was an assenting party to the transhipment of the powder to the *Fairy*; that there was no engagement on the part of the defendants or their agent that that vessel should continue for an indefinite time to be the warehouse for the powder; and that its removal to the *Lily* was done with the knowledge, if not with the actual sanction, of the captain of the *Johanna Ohiffa*, he standing by and knowing that it was put there.

[ERLE, C. J.—The captain grumbled; and the jury found that he did not assent to its removal. BYLES, J.—It was removed at the instance and for the benefit of the defendants.] They never had possession of it as bailees.

WILLIAMS, J.—As to the first part of the motion, viz., to reduce the damages by the amount of the expenses incurred at Valparaiso in respect of the non-delivery of the powder, we think the rule should be granted. With respect to the second part,—which in reality \*6] amounts to this, that my Lord should have told the \*jury that the fact of the captain having stood by and done nothing whilst the powder was removed from the *Fairy* to the half-decked vessel, the *Lily*, and having taken no active steps to get it placed elsewhere, afforded an answer to the plaintiffs' claim. I apprehend the learned judge would have been quite wrong if he had told the jury anything of the kind. The powder, it seems, was put on board the *Fairy* (which was not an unsafe or improper vessel for the purpose) with the captain's consent. If any accident had happened to it whilst there, without any default on the part of the defendants, probably there could have been no recourse against them either by the captain or by his owners. But the case is altogether altered when the defendants' agent, without the captain's consent, removed the powder from the *Fairy* to a half-decked vessel, where it must necessarily be exposed to increased peril. One of two things must result from such conduct,—either it was such a breach of the bailment as amounted to a trespass, taking the goods to a place to which the owners or the person representing them did not consent to their being taken,—or, at the election of the defendants, they must be taken to have retained the character of bailees (subject to the obligation of reasonable care), and the jury have found that they did not take reasonable care of the goods. In either view, therefore, they are liable; and, the goods having been lost, their value *primâ facie* is the measure of damages to be recovered. As to the captain's standing by, I apprehend that amounts to nothing, unless it can be construed into an acquiescence on his part in what was being done. That, however, the jury negatived. As to standing by, of itself, otherwise than as operating by way of consent, I apprehend there is no such doctrine known to the law. There will therefore be no rule on this.

\*7] \*BYLES, J.—I am of the same opinion. If the question had been as to the deposit of the powder on board the *Fairy*, there might have been some difficulty: it might have been said that the *Fairy* was lent to the captain as a place of deposit for it. But, when it was removed from the *Fairy* to the *Lily* without the consent of the captain of the *Johanna Ohiffa*, it may be that such removal amounted to a trespass; but, at the very least, it amounted to a converting of themselves by the defendants into bailees. In any event, therefore, they were under the obligation of taking reasonable care of the powder. They did not do this; for, they put it in a vessel which was manifestly unsafe. They are, therefore, clearly liable at all events to the extent of the value of the powder.

The rest of the court concurring, the rule was granted for a reduction of the damages.

*Lush*, Q. C., and *Sir G. Honyman*, now showed cause.—Whether

or not the costs incurred at Valparaiso were reasonably incurred, was a question for the jury, and it was left to them. Had Lane, the agent or superintendent of the defendants' establishment at Port Stanley, admitted their liability at once, the captain would not have defended the proceedings in the Spanish court. Their denial of liability induced him to incur the costs, and consequently they are responsible for them. [WILLES, J.—The loss of the gunpowder was the result of a bare wrong. How can the wrongdoers be responsible for the non-delivery of the powder according to contract?] It is submitted that this falls within the principle of the cases where costs which have been reasonably incurred are recoverable. [ERLE, C. J.—Is there any instance of the recovery of consequential damages beyond the value of the goods?] Special \*damage may be recovered in [\*8 trover. The ground upon which the plaintiffs rest their claim here, is, that the captain was induced by the conduct of the defendants' agent to take the course he did. [WILLIAMS, J.—The question is, whether the defendants sanctioned the defence?] No defence in truth was made. There was a mere seizure of the vessel, and the expenses in question were incurred in obtaining her release. It may be conceded that the plaintiffs would have no right to inflame their demand by the costs of an unrighteous defence to a righteous claim. [ERLE, C. J.—Could a vessel be seized in this country for the non-delivery of cargo pursuant to bills of lading? *C. Pollock*.—Dr. Lushington has recently so decided. WILLIAMS, J.—Suppose the captain on his arrival in this country had been arrested on a *capias*,—probably he might have charged the wrongdoers with the costs of the arrest; but, could he have recovered the costs of the declaration and subsequent proceedings? BYLES, J.—That would be a different case. An Englishman is bound to know the law of his own country, but not that of a foreign country.] *Tindall v. Bell*, 11 M. & W. 228, is an authority to show that the proper question for the jury in a case of this sort, is, whether the course pursued by the plaintiff was such as a prudent and reasonable man would under the circumstances pursue. That was the question which was left here. *Broom v. Hall*, 7 C. B. N. S. 503 (E. C. L. R. vol. 97), is a distinct authority in favour of the plaintiff. There, A., a broker, contracted with B. for the purchase (on behalf of C.) of certain goods. C. refusing to accept the goods, B. sued A. for the breach of contract. C. had notice of the proceedings, but repudiated his liability, and A. defended the action unsuccessfully. In an action by A. against C. for the damages and costs paid and incurred by him in the first action, C. paid into court \*enough to cover the damages only, and it was left to the jury [\*9 to say whether A., in defending the former action, had pursued the course which a prudent and reasonable man would have done in his own case. The jury having found for the plaintiff, it was held that A. was entitled to recover the costs. *Tindall v. Bell* applies the same doctrine to an action of tort. The degree of liability of a party is not to be altered by varying the form of action.

*Karslake*, Q. C., and *C. Pollock*, in support of the rule.—The damages must be limited to the value of the gunpowder. The captain entered into a contract to convey and deliver four hundred casks of powder at Valparaiso. Arriving there without it, the captain was



sued for the breach of contract; and, instead of submitting to the claim, he set up a defence which was held to be unjustifiable. No fraud or deceit was practised upon him by the defendants or their agent, so as to justify him in charging them with the burthen of his defence. There is no case or dictum to warrant the suggestion of Parke, B., in *Tindall v. Bell*, that the liability of the defendant in such a case is to depend upon the opinion of the jury as to whether or not it was reasonable under the circumstances to defend. [WILLIAMS, J.—Suppose the action had been for unliquidated damages, and the plaintiffs' demand was exorbitant,—would it not be a proper question for the jury whether or not it was reasonable to resist it?] That would be a very different case from this. This was like defending a money demand. As between the consignees and the captain of the *Johanna Ohiffa*, the latter had parted with the gunpowder the moment he consented to its being put on board the *Fairy*. [ERLE, C. J.—If the captain had landed the powder at Port Stanley and put \*10] it in a warehouse there, and it had been \*destroyed by lightning,—the act of God,—I take it the captain would have been liable to the consignees, even though by the charter-party he had a right to touch and stay at the Falkland Islands.] Clearly so. *Tindall v. Bell* was a case of collision. The salvors claimed 150*l*. The owners paid 20*l*. into court, and the salvors recovered 45*l*. more: and the Court of Exchequer held that the award of the Admiralty Court was the measure of what the owners should have paid, and therefore they had defended with a want of due care and skill. There are only two classes of cases where such costs as these can be recovered. One is, where the same question would be tried in the action which is defended, and the party on whose behalf it is defended has notice. In *Mayne on Damages*, p. 29, it is said: "There are several cases in which it appears to have been laid down as a general rule, that, where goods are sold with a warranty by A. to B., and B. re-sells with a similar warranty to C., who sues and recovers against him for breach of warranty, B. may recover against A. not only the costs and damages he had to pay C. in the former action, but also his own costs incurred in defending it: *Lewis v. Peake*, 7 Taunt. 152 (E. C. L. R. vol. 2), *Mainwaring v. Brandon*, 8 Taunt. 202; *Pennell v. Woodburn*, 7 C. & P. 117 (E. C. L. R. vol. 32). But it has been pointed out by Parke, B. (in *Walker v. Hatton*, 10 M. & W. 255), that *Lewis v. Peake* was decided on the ground that the plaintiff was not aware at the time he sold the horse(a) that the warranty was not complied with. Accordingly, where the plaintiff had purchased a horse of the defendant with a warranty of soundness, and sold it with a like warranty to J. S., and, the horse turning out unsound, J. S. brought an action against \*11] him, which he defended, and failed; \*the jury having found that the plaintiff ought to have discovered that it was unsound, at the time he sold it to J. S., it was held that he was not entitled to recover as specific damages the costs incurred by him in defending the former action: *Wrightup v. Chamberlain*, 7 Scott 598. The other class of cases is, where there has been an express request to the plaintiff to defend the former action. As to this Mr. Mayne says,

(a) Williams, J., observed that he should have thought this should have been "at the time he defended the action."

p. 30: "Of course, in all such cases as those above mentioned, the defendant in the second action will be liable for the costs of the first, if he has advised or sanctioned a defence being set up, because, by directing a defence, he has admitted that there were reasonable grounds for defending: *Williams v. Burrell*, 1 C. B. 402 (E. C. L. R. vol. 50), *Howes v. Martin*, 1 Esp. N. P. C. 162. And it would seem that slight evidence upon this point may warrant a jury in finding that the defence was sanctioned. A. sued B. in an action in which B. would have a remedy over against C.: B. gave notice to C. of the nature of the action, and called on him to come in and defend it. This C. refused to do, but did not forbid a defence being taken. B. suffered judgment by default, and put A. to the proof of his claim at the writ of inquiry. It was held that there was evidence to go to the jury that C. had sanctioned the defence, and, the jury having included these costs in the damages in the action by B. against C., the court refused a new trial: *Blyth v. Smith*, 5 M. & G. 405 (E. C. L. R. vol. 44), 6 Scott N. R. 360. In no case can the costs of defending an action be recovered, when that action is brought, not merely for the wrongful act of the defendant in the second action, but also for some wrongful act of the original defendant himself." As to any advice that Lane may have chosen to give the captain on the subject, he was not the agent of the defendants for that purpose. The simple question is, did a state of facts exist which would justify \*the captain as a man of ordinary care and experience in defending himself against the [\*12 proceedings at Valparaiso, when he by parting with the possession of the gunpowder as he did had been guilty of a breach of his contract. The obligation the captain was under to tranship or to land the powder before he could enter the harbour of Port Stanley, has nothing to do with his liability upon his contract to the consignees at Valparaiso.

ERLE, C. J.—I am of opinion that this rule ought to be made absolute to reduce the verdict by the amount of the costs of the litigation which took place at Valparaiso. The facts are these:—The ship *Johanna Ohiffa* having sailed with a general cargo under a charter-party on a voyage to Valparaiso, with liberty to touch and stay at the Falkland Islands, arrived at Port Stanley with goods to be delivered to the defendants, the Falkland Islands Company: but, as she had gunpowder on board, consigned to Valparaiso, it was necessary according to the regulations of the port to land or tranship it before she could be allowed to enter the harbour. Accordingly, in order to save the expense of landing and warehousing the powder, the captain of the *Johanna Ohiffa* accepted the offer of a schooner named the *Fairy* as a place of temporary deposit for it, the *Fairy* being a safe and convenient vessel for that purpose. The company's agent wanting the *Fairy* for another purpose, without the consent of the captain of the *Johanna Ohiffa*, removed the powder from her to the *Lily*, a half-decked vessel of smaller capacity, and an improper vessel for the purpose; and, a storm arising whilst the *Lily* was lying at anchor outside the harbour, she sank with the powder on board. The jury found that there was want of reasonable care on the part of the company in putting the \*powder on board the *Lily*. They, therefore, though gratuitous bailees, are liable for the value of the [\*18

powder, and for any consequential damages which the owner of it might sustain by its loss there. But the captain went on his voyage to Valparaiso, telling the company's agent that he would hold them responsible to his owners for the value. On his arrival at Valparaiso, the consignees, Messrs. Allsop, demanded the gunpowder. Now, it seems to me to be perfectly clear that a master of a ship who has signed a bill of lading making goods deliverable at a given port, and has permitted them to be taken out at an intermediate place and lost, has no answer to make to the consignee when he demands them. The captain of the *Johanna Ohiffa*, who knew his duty, must have been well aware of that. He, however, instead of admitting it, denied his liability. The ship was thereupon arrested, and a suit instituted in the proper court in Valparaiso, the abstract of the proceedings in which showed that there had been considerable discussion and delay in coming to an adjudication. The captain was called upon by virtue of his contract to deliver the goods. His defence failed him. That defence was entirely distinct from any conduct on the part of the Falkland Islands Company or their agent. They were no parties to the contract between the captain and Messrs. Allsop, and were in no way responsible for that litigation. The costs thereby incurred were not damages arising from the destruction of the gunpowder, so as to call upon the wrongdoers to pay them. In *Tindall v. Bell*, 11 M. & W. 228, the action was brought against the wrongdoer, who was clearly liable for the salvage the plaintiff would have to pay to the salvors. The plaintiff thought fit to litigate with the salvors. They claimed 150%. He offered 20%; and the Court of Admiralty awarded \*14] them 65%. The Court of Exchequer held that the plaintiff should \*have tendered reasonable compensation, that the 20% was not reasonable, but that the reasonable amount must be assumed to be the sum awarded by the court, and that the defendant was not liable for the costs of that litigation, because the plaintiff had not asked that the question whether or not they were reasonably incurred should be left to the jury. There, the damage claimed was clearly connected with the wrong. This is not so.

WILLIAMS, J.—I am of the same opinion. The question is, whether the plaintiffs have given any evidence that their incurring the litigation they did at Valparaiso was a reasonably necessary consequence of the wrong done to them by the defendants. I am of opinion that they have not given such evidence. On the contrary, I think the costs incurred in a defence which was wholly untenable was a useless and wasteful expenditure of money, which the plaintiffs have no right to call upon the defendants to reimburse them for.

WILLES, J.—I am of the same opinion. The damages which the plaintiffs were *prima facie* entitled to recover must be limited to the value of the goods lost through the defendants' wrongful act. The plaintiffs also claimed to be reimbursed for the costs they incurred at Valparaiso. In order to make out their right to recover these, they were bound to show that they were the necessary consequence of the wrong, and that a reasonable person would have defended the suit there. To prove this, the plaintiffs put in an abstract of the proceedings in that suit, which resulted in their defeat. They did not show, that, in the opinion of lawyers there, the issue was a doubtful matter:

and it certainly would not have been a doubtful matter here. Nor do they show that there was any reasonable doubt as to the [\*15 \*amount for which they were liable to the consignees of the gunpowder. Nor do they show that the captain was in any difficulty as to procuring the amount necessary to satisfy the just claim of the consignees, if that would have been material. Consistently with all that appeared, the value of the gunpowder was easily ascertainable; and there may have been nothing for the captain to do but to draw upon his owners and so get the money. All the costs, therefore, incurred at Valparaiso may have been unnecessary. I am unable to see any distinction between one part and the rest. I therefore think the claim for special damage has not been sustained in proof.

BYLES, J., concurred.

Rule absolute.

### TURQUAND, Official Manager, &c., v. MOSS. *May 28.*

Held,—upon the authority of *Ex parte Godden, In re Shettle, 1 De Gex, Jones & Smith 260*,—that, in the schedule of creditors assenting to or dissenting from a composition under the 192d section of the Bankruptcy Act, 1861, filed in pursuance of the general order in bankruptcy of the 22d of May, 1862, the names and the amount of the debts of all the creditors must appear, whether secured (wholly or in part) or unsecured.

A judge at Chambers having in the exercise of his discretion dispensed with bail on appeal, on the ground that the question to be determined was a doubtful one, and had been decided by the court in deference to a single authority,—the Court refused to set aside his order.

THIS was an action for rent. The defendant pleaded, as to 60*l.*, parcel, &c., a deed of composition under the 192d section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134); and, as to the residue, that, after the making and registration of the deed, the defendant had delivered up the lease. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after last Hilary Term. It appeared that the defendant had executed a deed of composition under the 192d section of the statute, which had been executed or assented to by sixteen out of the \*twenty- [\*16 eight creditors whose names appeared in the account or list filed with the chief registrar pursuant to the practice of the Bankruptcy Court.(a) The aggregate of the debts contained in that list was 684*l.* 0*s.* 10*d.*, three-fourths of which would be 475*l.* 0*s.* 7½*d.* The debts of the assenting creditors amounted to 491*l.* 8*s.* 8*d.*: but there was a debt of 420*l.* due to one Attenborough, which was not inserted in the list, he being fully secured by a deposit of plate, wines, and other property, with a power of sale. The defendant had also given Attenborough his acceptance for 287*l.* The insertion of either of these amounts would have turned the scale.

(a) The printed form of this account (which is prescribed by the General Order in Bankruptcy of the 22d of May, 1862), has the following note at the head of it:—"This is to be an account, to the best of the debtor's knowledge, information, and belief, of all the debts of the debtor [in cases of partnership, all the debts of the partnership, and the separate debts of each partner, are to be given in separate lists] which shall respectively amount to 10*l.* and upwards, and including debts secured, and showing the estimated value of any security." In the list filed in this case were the names of two creditors who held security,—the debt of the one being 70*l.*, and the estimated value of the security held by him (consisting of wines) being stated at 90*l.*; and the debt of the other being 300*l.*, and the estimated value of the security (wines and pictures) being stated at 120*l.*

It was submitted on the part of the plaintiff that the defendant had failed to prove that a majority in number representing three-fourths in value of his creditors had assented to or approved of the deed. On the other hand, it was insisted, that, inasmuch as the administration and distribution of the insolvent's property under the deed was to be in all respects the same as if he had been adjudged bankrupt and his estate had been administered in bankruptcy, and as \*17] \*Attenborough could not have proved in respect of his demand if the defendant had been adjudged bankrupt, it could not be necessary that it should appear in the list.

The learned judge ruled that all the debts, as well secured as unsecured, must be inserted in the list and taken into account; and he directed a verdict for the plaintiff (there being no evidence to support the second plea), reserving the defendant leave to move.

*Digby Seymour*, Q. C., accordingly, in Easter Term last, obtained a rule nisi to enter a verdict for the defendant on the ground that the composition deed was valid, notwithstanding the omission of Attenborough's name from the list of creditors.—He referred to *Ex parte Morgan*, *In re Woodhouse*, 32 Law J., Bankruptcy 15. [BYLES, J., referred to *King v. Randall*, 14 C. B. N. S. 721 (E. C. L. R. vol. 108), where it was held by this court, that, in estimating the number and value of the assenting creditors to a deed under the 192d section of the Bankruptcy Act, 1861, secured as well as unsecured creditors were to be taken into the account. ERLE, C. J.—If secured creditors are to count in ascertaining the numbers, why should they not in ascertaining the amount of assents?] In none of the cases where the point has arisen was the creditor secured to the full amount.

*A. Wills* and *F. M. White*, on a former day in this term, showed cause.—The question depends upon the construction of the 192d section of the 24 & 25 Vict. c. 134, which enacts that “every deed or other instrument made or entered into between a debtor and his creditors or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management, and winding up of his estate, \*18] or any of \*such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed,”—that is to say, amongst others,—“1. A majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to 10% and upwards, shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument,”—“5. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number, representing three-fourths in value of the creditors of the debtor whose debts amount to 10% or upwards, have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed.” In *Ex parte Godden*, *In re Shettle*, 32 Law J., Bankruptcy 37, the Lords Justices, on appeal, held that the word “creditors” in this section comprises the secured as well as the

unsecured creditors. "I think," said Lord Justice Turner, "that this deed has not the assent of the necessary proportion in value of the creditors; for, according to the best opinion which I can form upon the subject, I think, that, in reckoning the proportion of assenting creditors under this section, the debts due to secured as well as unsecured creditors must be taken into account: otherwise, creditors imperfectly secured would be left at the mercy of the unsecured creditors." And in *King v. Randall*, 14 C. B. N. S. 721 (E. C. L. R. vol. 108), Erle, C. J., intimates that *Ex parte Morgan* does not conflict with *Ex parte Godden*. The point is therefore *res judicata*, and can only be raised in a court of error.

\**Digby Seymour*, Q. C., and *H. James*, in support of the rule.—*Attenborough's* debt being fully secured, and creditors [\*19 under these deeds of arrangement having the same rights (s. 197) as creditors under a fiat in bankruptcy, he could not have proved, and therefore his debt need not be inserted in the list. In *Shelford on Bankruptcy*, 3d edit. 563, it is said, that, "if a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realizing his security; for, the principle of the bankrupt laws is, that all creditors are to be put on an equal footing, and therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt: but, if he has a security on the estate of a third person, that principle does not apply; he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than 20s. in the pound: *Ex parte Bennet*, 2 Atk. 527; *Ex parte Parr*, 1 Rose, B. C. 76; *Ex parte Goodman*, 3 Madd. 375." And the 197th section of the Bankruptcy Act, 1861, contains an enactment, that, "except where the deed shall expressly provide otherwise, the court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do if the debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy." *Ex parte Godden*, *In re Shettle*, 1 De Gex, Jones & S. 280, 32 Law J., Bankruptcy 37, was the case of an unsecured creditor. In *Ex parte Spyer*, *In re Josephs*, 32 Law J., Bankruptcy 62, 64, Lord Westbury, C., says: "Creditors under a deed of trust are put in the same position in \*which creditors under a [\*20 fiat are placed by the bankrupt law. Secured creditors, therefore, rank under the deed of trust for the amount remaining due after deduction of the value of their securities." It was held in that case, that, where the deed showed a clear intention that the estate should be administered as in bankruptcy, the insertion therein of a particular power repugnant to its general tenor formed no objection to the validity of the deed, but might be rejected. [WILLES, J.—This court, in *Leigh v. Pendlebury*, 15 C. B. N. S. 815 (E. C. L. R. vol. 109), declined to act on that case, holding that the whole of the deed must be looked at.] Here the deed upon the face of it is good. What would *Attenborough* prove for? In *Ex parte Morgan*, *In re Woodhouse*, 1 De Gex, Jones & S. 288, 32 Law J., Bankruptcy 15, 20,

Lord Westbury, C., says: "The 197th section causes the state of things under a trust-deed to be precisely the same as if there had been a bankruptcy instead of a deed of composition. Therefore, creditors under a trust-deed are in eodem statu as creditors under a bankruptcy. But creditors under a bankruptcy cannot prove without allowing for the value of their securities, and creditors under trust-deeds are subject to the same objection." [WILLES, J.—If the goods were burnt, whose would be the loss?] If the goods were destroyed without any default on the part of the bailee, he would no longer be a creditor holding security. To hold that a secured creditor is to be inserted for the amount of his debt, secured as well as unsecured, will be highly inconvenient. Secured creditors would naturally be favourable to the debtor: they would have no interest in common with the general body of creditors; and yet it might be that their insertion might turn the scale. If Attenborough's name were placed among those of the dissentient creditors, there would still be the \*21] requisite three-fourths in number. \*The amount of his debt is in reality nil. The judgment in *Ex parte Godden*, *In re Shettle*, it must be observed, was pronounced at a time when the decisions were conflicting. [BYLES, J.—The words "number and value" are the same in s. 192 of the Bankruptcy Act, 1861, as in the 224th section of the 12 & 13 Vict. c. 106: but the words explaining the meaning of "value" in the last-mentioned section are not found in s. 192.(a) "Value" means value to be estimated in the court of bankruptcy. There, the value is the amount due after deducting what may be realized by the security. And this appears from the form of the schedule, which is part of the practice of the court. The creditor's voice and his influence ought to be regulated by the amount of his pecuniary interest in the result. A fully secured creditor has no value. Some light is thrown upon the question by s. 97.(b) which enacts, that, "in the computation of debts for the purposes of any petition under this act, there shall be reckoned as debts,"—amongst others,—"*sums due to creditors holding mortgages or other available securities or liens, after deducting the value of the property comprised in such mortgages, securities, or liens.*" [ERLE, C. J.—*Ex parte Godden*, *In re Shettle*, seems to be a direct judgment to the point. We will look into the cases, and give our judgment to-morrow.]

*Cur. adv. vult.*

\*22] ERLE, C. J.—In this case a verdict was found for the \*plaintiff, subject to leave reserved to the defendant to enter the verdict for him if the court should be of opinion that the composition deed was executed by creditors to the required number and value. And that question depends upon whether or not the amount of debts owing to creditors holding security are to be taken into account. I am of opinion that the amount of secured debts must be taken into the account: and I come to that conclusion because I find in the case

(a) "Provided always that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him."

(b) Lord Justice Knight Bruce seems to have thought otherwise in *Ex parte Godden*, *In re Shettle*, 1 De Gex, Jones & Smith 270, 271.

of *Ex parte Godden*, *In re Shettle*, 1 De Gex, Jones & S. 260, 32 Law J., Bankruptcy 37, upon appeal from a decision of Mr. Commissioner Holroyd, the Lords Justices pronounce a judgment expressly upon the point, and giving their reasons, which are perfectly satisfactory to my mind. It is the *ratio decidendi*, and the decision of a court of high judicature. I am quite aware that there were two points raised in that case, and that either of them would afford ground for disposing of the case as it was disposed of. But the point is considered by the Lords Justices; and must therefore be looked upon as *res judicata*. We have referred to the report of the case in 1 De Gex, Jones & Smith 260, and there we find the ground of the decision made still more apparent. In *Ex parte Spyer*, *In re Josephs*, at page 318 of the same volume, where a discussion arose upon the validity of a deed under the same statute, observations are made by the Lord Chancellor and by one of the counsel arguing before him, which seem to tend to a different view of the law. But there was no adjudication of the point there, and no definite expression of opinion by Lord Westbury,—nothing, in short, which ought to weigh against the deliberate judgment of Lord Justice Knight Bruce and Lord Justice Turner in the former case. No doubt considerable light is thrown upon the Bankruptcy Act, 1861, by comparing it with the 12 & 13 \*Vict. 106. Both contain analogous provisions as to deeds. [\*23 There are several cases upon the subject in the 1st volume of De Gex, Jones & Smith; and the material provisions of the two statutes are set out at pp. 230 et seq. The question now before us arises under the act of 1861, and could not have arisen in respect of a composition deed under the former act, for the 224th section of that act contains an express proviso that secured debts should not be taken into account. The statute of 1861 leaves out that proviso: and we must assume that the legislature intentionally omitted it. *Ex parte Godden*, *In re Shettle*, is a clear decision upon the point, and I am of opinion that our judgment must be in accordance with it.

WILLIAMS, J.—I also am of opinion that we must decide this case upon the authority of the express judgment delivered by the Lords Justices in *Ex parte Godden*, *In re Shettle*, 1 De Gex, Jones & Smith 260. Although there was another ground upon which the judgment in that case proceeded, the very point now under consideration was argued, and a deliberate judgment was pronounced upon it. In *Ex parte Morgan*, *In re Woodhouse*, 1 De Gex, Jones & Smith 288, 32 Law J., Bankruptcy 15, the Lord Chancellor expressed an opinion and decided the case apparently in a manner inconsistent with the decision of the Lords Justices in *Ex parte Godden*, *In re Shettle*. But *Ex parte Godden* was cited there, and the Lord Chancellor does not express any disapproval of it. In *Ex parte Spyer*, *In re Josephs*, the counsel for the respondent (see 1 De Gex, Jones & Smith 323) appear to have considered the position of the Lord Chancellor in *Ex parte Morgan* to have been different from the decision of the Lords Justices in *Ex parte Godden*. I conceive the latter to be a [\*24 \*decision upon the very point now before us, and therefore that we are governed by it.

WILLES, J.—I am of the same opinion.

BYLES, J.—I am also of opinion that we are entirely governed by



the authority of the case decided by the Lords Justices, *Ex parte Godden*, *In re Shettle*, 1 De Gex, Jones & Smith 260, 32 Law J., Bankruptcy 37. But for that decision, I must confess I should have felt inclined to adopt a different conclusion. The case of a creditor having a deposit of goods, with a power of sale, stands very much in the same position I should have thought, as a case of set-off or of mutual credit.

Rule discharged.

*June 3.* The defendant having appealed against this decision, Byles, J., made an order at Chambers under the 38th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), that bail in error should be dispensed with. The affidavits upon which this order was obtained stated in substance as follows:—

"The issues of fact in this cause were tried at the sittings after last Hilary Term at Guildhall, before Byles, J., when a verdict was directed by the learned judge to be entered for the plaintiff, with liberty to the defendant to move to enter the verdict for him:

"The facts upon which such verdict was entered and leave reserved were these:—It appeared from the evidence of the defendant that he was indebted at the date of the registration of the deed of composition set forth in the pleadings to a Mr. Attenborough, for money lent, \*25] in a sum of upwards of 400*l.*, but that \*Mr. Attenborough held security of a larger value, and that the sum so due and secured to Mr. Attenborough had not been calculated in estimating the three-fourths in value of the defendant's creditors required by the Bankruptcy Act, 1861, to assent to the said deed of composition. Thereupon it was contended by the plaintiff that the requisitions of the 192d section of the Bankruptcy Act, 1861, had not been complied with, inasmuch as the sum lent by Mr. Attenborough constituted him a creditor, and the amount of his demand must be taken into consideration in calculating the amount of indebtedness of the defendant; and, if this were done, it would be found that three-fourths in value of the defendant's creditors had not assented to the deed:

"It was, on the other hand, contended by the defendant that the sum borrowed of Mr. Attenborough could not be taken into consideration, inasmuch as he was fully secured, and the word 'value' in the 192d section of the statute meant value after deduction of the value of the securities held by the creditor; and that, if Mr. Attenborough's debt were taken into consideration, it could only be for the purpose of estimating the *number* of creditors, and, notwithstanding the addition of his name, the majority had assented to the deed:

"In Easter Term last, the defendant obtained a rule nisi to enter the verdict for him, pursuant to the leave reserved, on the ground that the deed was valid, notwithstanding the omission of Attenborough's name from the list of creditors. The rule was argued on the 27th of May last, and the court took time to consider. On the 28th, the court delivered judgment and discharged the rule,—Mr. Justice Byles intimating that he felt bound to follow the decision of the Lords Justices in *Ex parte Godden*, *In re Shettle*, 1 De Gex, \*26] \*Jones & S. 260, 32 Law J., Bankruptcy 37, otherwise he entertained a strong leaning towards the defendant's contention:

"The point raised is one of great moment to the public and to the legal profession, and the result is watched with much anxiety, as many deeds framed under the 192d section of the Bankruptcy Act, 1861, have been registered upon the same basis in estimating the three fourths in value of the creditors as the deed now in question:

"The defendant desires to appeal against the said decision, not for the purpose of delaying the plaintiff, but solely with the bonâ fide intention of obtaining the decision of the court upon the point of law raised as above stated."

*A. Wills* now moved to rescind this order.—He submitted that there was no ground for departing from the ordinary rule of practice in this case; and that the case of *Bevan v. Whitmore*, 15 C. B. N. S. 442 (E. C. L. R. vol. 109), upon the authority of which the order was made, was peculiar in its nature, and decided upon grounds which could have no application to a case of this sort. [BYLES, J.—I made the order because the court decided what was manifestly a very doubtful question, upon the authority of a judgment by which they felt themselves bound.]

ERLE, C. J.—This was a matter entirely within the competency of the learned judge to decide. He, having tried the cause, and knowing all about it, has exercised his discretion, and I do not feel justified in interfering.

The rest of the court concurring,

Rule refused.

\*NICOLL *v.* GREAVES. May 30. [\*27

*A Huntsman* is a menial servant, and therefore the hiring of a huntsman, though in terms for a year, and upon conditions which can only be fully carried out by a service enuring for the full period of a year, is subject to the ordinary condition that it may be determined by either party at a month's notice.

THIS was an action for the alleged wrongful dismissal of a huntsman. The first count of the declaration stated an employment of the plaintiff by the defendant for a year as huntsman and first whip in kennel, at the wages of 100*l.*, with draft-hounds, coals, and bones, leave to keep a pig, two coats, two waistcoats, two pairs of breeches, two pairs of boots, one cap, one whip, and one pair of spurs, and alleged a wrongful dismissal before the end of the year. The second count alleged a hiring until determined by reasonable notice, and charged a dismissal without reasonable notice. The third count alleged a hiring until determined by a six months' notice, and charged a dismissal without such six months' notice. The fourth count alleged a hiring until determined by a three months' notice, and charged a dismissal without such three months' notice.

The defendant by his first and second pleas traversed the agreements and dismissals as alleged; and by his third plea (to the second count) alleged a determination of the hiring by a reasonable notice. Issue thereon.

The cause was tried before Williams, J., at the first sitting in Easter Term last. The facts were as follows:—In the month of February, 1863, the defendant, who was the master of the Old Berkshire fox-

hounds, engaged the plaintiff as huntsman upon the terms contained in the following memorandum:—"100*l.* a year, draft-hounds, coals, and bones, leave to keep a pig, two coats, two waistcoats, two pairs of breeches, two pairs of boots, one cap, one whip, one pair of spurs." The plaintiff entered on the service on the 7th of April, and remained \*28] therein until the 16th of October, when \*he received a month's notice to quit. His salary was paid up to the 16th of November.

The contention on the part of the plaintiff was, that a huntsman's position differed from that of a menial or domestic servant, and therefore that he was not liable to be dismissed at a month's notice. Several witnesses, who had had various engagements as whippers-in and huntsmen for periods varying from three to thirty years, were called for the purpose of establishing a custom for the hire of a huntsman for the "season." They all stated that they had always had their engagements terminated with the season, by notices varying from one to six months, and that they never knew of an instance of a huntsman being dismissed in the course of the season. Some of them stated, that, though the season did not commence so early, it was usual for the hiring to take place in April, in order to give the huntsman an opportunity of becoming familiar with the hounds and the country to be hunted.

It was also proved that the plaintiff, whilst in the defendant's employ, occupied a cottage which formed part of his farm premises, and was distant about half a mile from his own residence, but not within the curtilage; that the advantages accruing to the huntsman from the draft-hounds (the sale of useless or mismatched hounds) would be worth about 50*l.* a year, and that arising from the sale of the bones about 25*l.* more; and that the usual time of drafting was at the end of the season.

On the other hand, it was contended on the part of the defendant that a huntsman ranked with ordinary domestic or menial servants, and was subject to removal on the same terms. And several witnesses were called on his behalf, masters of hounds and others, who \*29] denied that there was any such custom as that \*attempted to be set up by the plaintiff, and stated that they had always dismissed their huntsmen at a month's notice.

The learned judge told the jury, that, whether or not a huntsman was a menial servant, was a question of law; that there might be a custom by which the engagement was determinable only at the end of the season; but that, in his opinion, the evidence given did not go far enough to show the existence of a custom either way. But he reserved leave to the defendant to move to enter a nonsuit if it should become necessary.

The jury,—affirming the custom set up by the plaintiff, to dismiss at a month's notice only at the end of the season,—returned a verdict for the plaintiff, damages 80*l.*

*Overend, Q. C.*, accordingly, in Easter Term, obtained a rule nisi to enter a nonsuit, on the grounds that the plaintiff was a menial servant and liable to be dismissed on the usual month's notice, and that there was no evidence of any custom to take the case out of the ordinary rule as to menial servants; or for a new trial, on the ground

that the verdict was against the weight of evidence, if the court should be of opinion that there was any evidence to go to the jury of the existence of a custom to dismiss huntsmen on any other notice than that received for menial servants. He referred to *Nowlan v. Ablett*, 2 C. M. & R. 54. There, the plaintiff agreed to enter the defendant's service as head-gardener, and to have the management and superintendence of the defendant's hot-houses, pineries, &c., at the wages of 100*l.* per annum. The plaintiff resided in a house belonging to the defendant, in his domain, but apart from the defendant's house. The plaintiff had the privilege of taking \*apprentices, [\*30 and had taken two at 15*l.* per annum premium. The plaintiff remained with the defendant in the capacity above mentioned about four years, when the defendant gave him a month's warning. In an action for a quarter's wages,—the plaintiff claiming to be engaged on a yearly hiring,—it was held that he was a menial servant only, and only entitled to a month's warning.

*Huddleston*, Q. C., and *Griffiths*, now showed cause.—The question is, was this plaintiff a menial servant, or was he hired upon a contract for dismissal only at the end of the season. [ERLE, C. J.—Rather, if he was of the class of servants termed “menial,” was the contract such as to take him out of the custom as to the dismissal of menial servants.] His position as huntsman was one of responsibility and trust; and the terms of his employment were such as to require an engagement more permanent than that of an ordinary domestic or menial servant. For the purpose of his acquiring the benefit of the drafting of the hounds, it was necessary that his services should be retained until the end of the season, until which time the drafting could not take place. Nor could he have the full benefit of the other stipulations in the agreement, if liable to summary dismissal. It is extremely difficult to define with accuracy what is a menial or domestic servant, who are placed by all the authorities in the same category. In *Nowlan v. Ablett*, 2 C. M. & R. 54, the head gardener, though hired at a yearly salary, and not resident in the house, was held to occupy the position of a menial servant. But, in *Todd v. Kerrich*, 8 Exch. 151, a governess engaged at a yearly salary, though residing in the house, was held not to be within the class of domestic or menial servants. “The point reserved,” says Pollock, C. B., [\*31 \*—“was, whether a governess is within the rule by which a menial or domestic servant may be discharged with a month's notice or a month's wages. We are of opinion that she is not. The position which she holds, the station she occupies in a family, and the manner in which such a person is usually treated in society, certainly place her in a very different situation from that which mere menial and domestic servants hold.” In *Louth v. Dummond*, Coram Parke, B., Kingston Spring Assizes, 1849, cited in *Smith's Master and Servant*, 2d edit. 52, it was held that a “farm-bailiff” could not be got rid of on a month's notice. Looking at the whole circumstances and the nature of the contract, it is obvious that it was the intention of both parties that this should be a yearly hiring, subject to be determined by a six months' notice or a reasonable notice, ending with the end of the season. Much inconvenience and annoyance might arise if either party could put an end to such a contract in the midst of the

season. There was abundant evidence to support this view. It was not to be expected that a usage or practice like this should be proved as completely as a custom of a particular trade in the city of London.

*Overend, Q. C., and Le Breton*, in support of the rule.—This plaintiff was a menial servant,—part of the retinue of his master. A farm-labourer or a farm-bailiff, it seems, would not come within the category of menial or domestic servants. The head-gardener, though not living in the master's house, but in a cottage in the domain, has been held to be within that class, notwithstanding the hiring was surrounded by many special privileges which at first sight would appear inconsistent: *Nowlan v. Ablett*, 2 C. M. & R. 54. Is there anything superior or less menial in the huntsman? A good gardener must be \*32] a person of a \*considerable amount of education. Lord Abinger in that case said: "I should have been inclined to have told the jury that the plaintiff was a menial servant; for, though he did not live in the defendant's house, or within the curtilage (*intra mœnia*), he lived in the grounds within the domain." In *Crocker v. Molineux*, 8 C. & P. 470 (E. C. L. R. vol. 14), a servant being engaged for a year at 30 guineas and a suit of clothes, was provided with a livery suit on his entering the service: he was wrongfully turned away within the year: and it was held that he could not maintain trover for the clothes. "If," said Lord Tenterden, "the plaintiff was dismissed without reasonable cause, whereby he was prevented from becoming entitled to this suit of clothes, he has his action for that: but he cannot maintain an action of trover, because he has no property in the clothes till he has served a year." The case of the governess is of a totally different character. That of the huntsman is in no respect different from the gardener, the coachman, or the groom. The inconvenience suggested of such a contract as this being determinable at a month's notice in the middle of the season, would be no greater than the loss of a cook or a coachman in the middle of the London season would be to persons of a certain class. Besides, the head whip is always ready and competent to take the place of the huntsman, upon an emergency. The suggestion as to the special nature of the contract is answered by the case of *Johnson v. Blenkinsopp*, 5 Jurist 870. There, by a written memorandum of agreement between the defendant and the plaintiff, the plaintiff was "to have 6s. a week, three bolls of wheat, to set potatoes for his family's use, to have a cow kept, house and firing, to keep the gardens and pleasure-grounds in clean and good order, to assist in the stables, and when \*33] required at hay and corn harvest, and to make \*himself generally useful: to enter 12th May, 1838." The defendant had dismissed the plaintiff upon a month's warning. In an action brought by the plaintiff to recover a quarter's wages, as being a yearly servant,—it was held that he was a menial servant, and was therefore by the general rule of law entitled to a month's notice only; and that the memorandum of agreement contained nothing which showed an intention in the parties to exclude that rule. [ERLE, C. J.—How is a "huntsman" classed in the Assessed-Tax Acts?] With household servants: see 52 G. 3, c. 93, Sched. C. No. 1. The 16 & 17 Vict. c. 90, Sched. C., contains a special provision as to gardeners. His duties, his habits, and his associates, all tend to place the huntsman in the

category of menial servants. There was, properly speaking, no evidence given by the plaintiff at all of a custom. The utmost it amounted to was the assertion of isolated facts and personal experiences of the witnesses themselves. To constitute a custom, some uniform practice universally received and acted upon with reference to the matter in hand must be shown. None such was shown. The witnesses called on the part of the defendant, on the other hand, distinctly proved a *right* to dismiss at a month's notice, though they admitted that for mutual convenience the engagement was generally carried on to the end of the season.

ERLE, C. J.—I am of opinion that this rule must be made absolute to enter a nonsuit or a verdict, as the plaintiff may choose. The action is brought upon a contract for the hiring of the plaintiff in the capacity of huntsman: and it is clear that the contract was in terms for a year's service. The point to be determined, is, whether or not the plaintiff falls within the class of servants commonly termed in the cases and in the \*treatises on the subject of the relative rights [34 and duties of masters and servants, menial or domestic; because the law is now firmly established that the hiring for a year of a person in that class is subject to the condition that either party may put an end to the relation at any time upon giving the other a month's notice or a month's wages. Does a huntsman, then, fall within the class of menial servants? It is well observed in the very excellent treatise on the law of Master and Servant, by Mr. Manley Smith, p. 52, that "no general rule can be laid down as to who do and who do not come within the category of menial servants. Each case must depend upon its own circumstances." But it seems to me that the reason of the rule in these cases is, that there are some contracts for services which bring the parties into such close proximity and frequency of intercourse,—valuable if mutually agreeable, but intolerably annoying should it be otherwise,—that it is highly desirable that either party should be at liberty to put an end to them if so minded. Where the service is of such a domestic nature as to require the servant to be frequently about his master's person, or, as in the case of the gardener, about his grounds, if any ill-feeling should arise between them, the constant presence of the servant would be a source of infinite irritation and annoyance to the master. The law and the reason of the law are mutual. The servant may have an exacting and dissatisfied master, constantly finding or imagining faults or shortcomings: in such a case, the sooner the servant can free himself from his disagreeable position the better for his comfort and happiness. It is therefore for the benefit of both that the contract which binds two incompatible tempers together should be easily determinable. Does the position of a huntsman differ in this respect from that of [35 any other servant in \*the establishment? He would have to be frequently in communication with the owner or master of the hounds; and, if so minded, might make the expensive luxury of keeping hounds a source of vexation rather than of enjoyment to their proprietor. It may also be that the master of the hounds may be a person of rough and uncourteous bearing, irritable about trifles, and dissatisfied with the best attempts to please: in such a case it would be just as much to the interest of the huntsman, if he has any self-

respect, to be able to terminate at a month's notice a state of tyranny and oppression. For these reasons, it appears to me that a huntsman comes within the description of servants to which I have been referring. The legislature, in the Assessed Tax Acts which have been cited, seem to have drawn the line between persons employed in a service of luxury, in respect of whom the master is taxable, and those of necessity, such as servants in trade and husbandry, in respect of whom he is not taxable. In the list of the former we find the huntsman. Take the two cases which have been decided,—*Nowlan v. Ablett*, 2 C. M. & R. 54, in the Exchequer, and *Johnson v. Blenkinsopp*, 5 Jurist 807, in the Queen's Bench. In the former, the head gardener was held to be a menial servant, though the terms of his hiring were general as to time, and subject to provisions which ordinarily would seem to be inconsistent with an abrupt termination of his service. Now, a servant filling the capacity of head gardener must be a man of considerable acquirements to enable him to perform his duties efficiently and properly. And although in that case he had a separate residence, he was still held to be a domestic servant; and very properly so, as I conceive, for the garden is as much a source of comfort and enjoyment as any part of a man's dwelling. So, in \*36] *Johnson v. Blenkinsopp*, the \*plaintiff seems to have been hired as a superior sort of servant, and the contract, as in the former case, gave him many privileges and advantages not usually enjoyed by menial servants; and yet it was held that he might be dismissed at the ordinary month's notice. In each case the terms of the contract showed that both parties hoped that the service would continue at least for a year, but still the court held that the contract was subject to the ordinary condition. So here, although the plaintiff was to have the draft-hounds and other privileges and perquisites, yet, as he comes within the class of menial servants, all that must be taken subject to the condition which overrides all contracts for menial or domestic service, viz. that it shall be determinable at any time upon either party giving to the other a month's notice. Upon the evidence of the plaintiff in this case, I find nothing to show that the contract was made upon the terms that this rule of law or implication of usage should be excluded. No doubt it was within the competency of the parties to the contract to engage for a year certain, or for a service dissoluble only upon a three or a six months' notice. Such a special contract would have overridden the general rule of law. But no such contract is to be found here; nor was any evidence given from which it could be inferred that a different usage prevailed with regard to huntsmen from that which governs the hiring of ordinary domestic servants. The notice given, therefore, was a sufficient notice to determine the engagement.

WILLIAMS, J.—I am entirely of the same opinion. At the trial the question was treated by the plaintiff's counsel as one of law: and I dealt with it accordingly. I entirely agree with my Lord in the conclusion he has come to, and also in the reasons he has given. \*37] An \*attempt was made on the part of the plaintiff to give evidence of a custom peculiar to huntsmen, assuming a huntsman to fall within the class of menial servants. But I told the jury I could discover no evidence upon which they could properly find such a cus-

tom. The utmost the evidence for the plaintiff amounted to, was, the story of the individual experiences of his witnesses. There was nothing which could be considered as a legal foundation for any such custom. The real question to be decided was, whether the hiring of a huntsman was determinable at a month's notice. After maturely considering all the evidence that was given, I have come to the conclusion that the case of the huntsman must be governed by the general rule applicable to all other domestic servants.

WILLES, J., concurred.

BYLES, J.—I am of the same opinion. Considerable difficulty, as it seems to me, is introduced by holding menial to be synonymous with domestic.(a) “\*Menial” would seem to be derived from [\*38 the same root as “menage,”(b) one of the retinue or attendance. The huntsman was always considered one of the retinue, even of the Princes of the Church in olden times.(c) He goes out with his master, and wears his livery. An agricultural or farm labourer (*Lilley v. Elwin*, 11 Q. B. 742 (E. C. L. R. vol. 68)), a farm-bailiff (*Louth v. Drummond*, Kingston Spring Assizes, 1849), and a governess (*Todd v. Kerrick*, 8 Exch. 151), have been held not to come within the description of menial or domestic servants whose service may be put an end to by a month's notice. The contrary was held in the case of the head gardener, *Johnson v. Blenkinsopp*, 5 Jurist 870; and that seems to be the dividing line. I do not think we shall be wrong in holding that the case of the huntsman does not go beyond that. As to the supposed usage, there was no evidence to sustain it. And in truth the jury have only found that which was agreed on both sides, viz. that, in many cases, for convenience sake, the huntsman's engagement has been put an end to at the close of the season.

Rule absolute.

(a) Nothing very satisfactory is to be gathered from any of the Dictionaries which are usually referred to as authorities.

The word “domestic” is defined by Johnson to mean “belonging to the house,” “inhabiting the house:” in Richardson, “of or appertaining to house or home:” and in Webster, “one who lives in the family of another, as a chaplain or secretary: also, a servant or hired labourer residing with a family.”

“Menial” is said by Johnson to be derived from *meiny* or *many*; *meenic*, old French; and is thus defined,—“Belonging to the retinue or train of servants;” “one of the train of servants:” and he refers to *Termes de la Ley*, p. 429, where it is said that “menials are those servants which live within their master's walls of his house: see the stat. of 2 H. 4, c. 21.” Richardson defines menial to be “a company or retinue,—the company or collected number of a household or family.” And Webster, as “belonging to the retinue or train of servants;” “a domestic servant.”

A “servant” is defined by Johnson to be “one who attends another, and acts at his command;” by Richardson, as “one who does the bidding of a master;” and by Webster, as “a person that attends another for the purpose of performing menial offices for him.”

(b) In the *Dictionnaire de l'Académie Française*, “Menage” is described as “Gouvernement domestique, et tout ce qui concerne la dépense et l'entretien d'une famille.”

(c) Erie, C. J., observed that a “huntsman” was formerly a part of the retinue of the Temple.



\*39]

\*NOTHARD v. PEPPER. May 30.

In an action for a collision, the examination of the captain of the plaintiff's ship, taken by the receiver of wrecks under the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 448, is not admissible for the defendant, under s. 449, for the purpose of proving the fact that the damage to the plaintiff's ship from the collision was on her starboard bow; such fact being offered for the purpose of showing that the plaintiff's ship was in fault,—the question which ship caused the damage to the other not being a matter which the receiver had power under s. 448 to examine into.

THIS was an action for damage done to the plaintiff's ship by a collision with a vessel belonging to the defendant, through the negligence of the master and mariners. The cause was tried before Byles, J., at the sittings in London after last term.

There was conflicting evidence as to which vessel was in fault; and in the result the jury found a verdict for the plaintiff.

Upon the cross-examination of the captain of the plaintiff's vessel, the defendant's counsel proposed to put in a statement which had been made by him upon oath before the receiver of wrecks at Grimsby, under the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 448 (made evidence by s. 449). This examination was offered, not only for the purpose of showing that the captain's statement on that occasion was at variance with the evidence he was giving at the trial, but also as substantive evidence of one of the facts therein contained, viz., that the damage received by the plaintiff's vessel was on her starboard bow, which, as both vessels were going free, and therefore both bound to port, would show that the plaintiff's vessel must have been in fault.

The learned judge, however, rejected the evidence, and the jury found a verdict for the plaintiff.

Brett, Q. C., in Easter Term last, obtained a rule nisi for a new trial on the ground of the improper rejection of evidence, and also that the verdict was against the weight of evidence. He referred to the 439th section of the statute, which empowers the board of trade \*40] to appoint receivers, and to the 448th and 449th sections, \*the former of which provides for certain matters to be examined into before the receiver, and the latter of which makes such examination *prima facie* evidence of the matters therein contained. [WILLES, J., referred to *Richardson v. Mellish*, 2 Bing. 229, 9 J. B. Moore 485, where books containing lists of passengers, deposited at the India House, pursuant to the 53 G. 3, c. 155, ss. 15, 16, were held to be admissible in evidence towards showing the value of a voyage.]

*Edward James*, Q. C., and *Warton*, showed cause.—The examination in question was offered not simply to contradict the plaintiff's captain, but as substantive evidence to show that the negligence was on the part of the plaintiff's servants, and not on that of the defendant's servants. The question turns mainly upon the construction of the 448th and 449th sections of the 17 & 18 Vict. c. 104. Section 448 enacts that "any receiver, or, in his absence, any justice of the peace, shall, as soon as conveniently may be, examine upon oath any person belonging to any ship which may be or may have been in distress on the coasts of the united kingdom, or any other person who may be able to give any account thereof or of the cargo or stores thereof, as

to the following matters, that is to say,—1. The name and description of the ship,—2. The name of the master and of the owners,—3. The names of the owners of the cargo,—4. The ports or places from and to which the ship was bound,—5. The occasion of the distress of the ship,—6. The services rendered,—7. Such other matters or circumstances relating to such ship, or to the cargo on board the same, as the receiver or justice thinks necessary: And such receiver or justice shall take the examination down in writing, and shall make two copies of the same, of which he shall send one to the board of \*trade [\*41 and the other to the secretary of the committee for managing the affairs of Lloyd's in London, and such last-mentioned copy shall be placed by such secretary in some conspicuous situation for the inspection of persons desirous of examining the same; and, for the purposes of such examination, every receiver or justice as aforesaid shall have all the powers given by the first part of this act to inspectors appointed by the board of trade." And s. 449 enacts that "any examination so taken in writing as aforesaid, or a copy thereof, purporting to be certified under the hand of the receiver or justice before whom such examination was taken, shall be admitted in evidence in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, as *prima facie* proof of all matters contained in such written examination." These are, unquestionably, very extensive terms: but they must be subject to some reasonable limitation,—to the inquiry, for instance, into which the receiver is authorized to enter. The provisions in question, it is to be observed, are found in that part or division of the Merchant Shipping Act which relates exclusively to "wrecks, casualties, and salvage," and more especially to the duties of receivers in the institution of "inquiries into wrecks." In order to ascertain the intention of the legislature, it will be necessary to refer briefly to the whole of those provisions. The 432d section, which commences this branch of the statute, enacts that, "In any of the cases following, that is to say,—whenever any ship is lost, abandoned, or materially damaged on or near the coasts of the united kingdom,—whenever any ship causes loss or material damage to any other ship on or near such coasts,—whenever by reason of any casualty happening to or on board of any ship on or near such coast loss of life \*ensues,—whenever any such loss, abandonment, damage, or [\*42 casualty happens elsewhere, and any competent witnesses thereof arrive or are found at any place in the united kingdom,—it shall be lawful for the inspecting officer of the coast-guard or the principal officer of customs residing at or near the place where such loss, abandonment, damage, or casualty occurred, if the same occurred on or near the coasts of the united kingdom, but, if elsewhere, at or near the place where such witnesses as aforesaid arrived or are found or can be conveniently examined, or for any other person appointed for the purpose by the board of trade, to make inquiry respecting such loss, abandonment, damage, or casualty: and he shall for that purpose have all the powers given by the first part of this act to inspectors appointed by the said board." Section 433 enacts, that, "If it appears to such officer or person as aforesaid, either upon or without any such preliminary inquiry as aforesaid, that a formal investi-

gation is requisite or expedient, or if the board of trade so directs, he shall apply to two justices or to a stipendiary magistrate to hear the case: and such justices or magistrate shall thereupon proceed to hear and try the same, and shall for that purpose, so far as relates to the summoning of parties, compelling the attendance of witnesses, and the regulation of the proceedings, have the same powers as if the same were a proceeding relating to an offence or cause of complaint upon which they or he have power to make a summary conviction or order, or as near thereto as circumstances permit; and it shall be the duty of such officer or person as aforesaid to superintend the management of the case, and to render such assistance to the said justices or magistrate as is in his power: and, upon the conclusion of the case, the said justices or magistrate shall send a report to the board of trade,

\*43] containing a full statement of the case and of their or his opinion thereon, accompanied by such report of or extracts from the evidence, and such observations (if any) as they or he may think fit." By s. 434, the board of trade are empowered to appoint a nautical assessor. Sections 435 and 436 provide for the mode of proceeding in places where there is a marine board, and for the costs of the investigation. By s. 438, the master or mate may be required to deliver his certificate to the justices, to be held by them until the close of the inquiry. Section 439 empowers the board of trade to appoint receivers of wrecks. The duties and powers of that officer in case of stranding or accident to any ship or boat are defined by ss. 441 and 442. The 441st section enacts, that, "whenever any ship or boat is stranded or in distress at any place on the shore of the sea or of any tidal water within the limits of the united kingdom, the receiver of the district within which such place is situate shall, upon being made acquainted with such accident, forthwith proceed to such place, and, upon his arrival there, he shall take the command of all persons present, and assign such duties to each person, and issue such directions, as he may think fit, with a view to the preservation of such ship or boat, and the lives of the persons belonging thereto, and the cargo and apparel thereof: but it shall not be lawful for such receiver to interfere between the master of such ship or boat and his crew in matters relating to the management thereof, unless he is requested so to do by such master." And the 442d section enacts that "the receiver may, with a view to such preservation as aforesaid of the ship or boat, persons, cargo, and apparel, do the following things, that is to say,—1. Summon such number of men as he thinks necessary to assist him,—2. Require the master or other person having

\*44] the charge of any ship or boat \*near at hand to give such aid with his men, ship, or boats as may lie in his power,—3. Demand the use of any wagon, cart, or horses that may be near at hand: And any person refusing without reasonable cause to comply with any summons, requisition, or demand so made as aforesaid, shall for every such refusal incur a penalty not exceeding 100*l*." Section 443 provides for the delivery to the receiver of all articles washed on shore or lost or taken from any ship or boat. Then follow provisions for the suppression of plunder, the exercise by other persons in his absence of the powers vested in the receiver, &c.: and then come the provisions upon which this question turns. These, though general

in terms, must be read with reference to the objects embraced by this portion of the statute. [BYLES, J.—Suppose the examination had recited a charter-party, could the charter-party have been kept back, and the examination made *prima facie* evidence of its contents?] It is submitted it could not. [BYLES, J.—The Indian Mandamus Act, 13 G. 3, c. 63, s. 44, contains no statement as to what shall be done with the evidence taken under the writ, but it is never read if the witness is here. So, this examination, I apprehend, would not dispense with calling the captain. But for the statute, the statements of the captain upon his examination before the receiver would amount to nothing more than admissions by a person who was not the agent of his owner for the purpose of making admissions. If this had been offered merely for the purpose of contradicting the captain, I should have admitted it. Brett, Q. C.—The statute was not required to make it admissible for that purpose. WILLIAMS, J.—If Mr. Brett's contention is right, the examination taken before the receiver would be admissible in a case of piracy or murder.] To make it admissible, the examination must relate to an inquiry which \*it was competent to the receiver to enter upon, viz., wreck and salvage. [\*45 The statement of the captain as to the part of the ship to which the damage was done was wholly irrelevant and beyond the competency of the receiver to inquire into. [BYLES, J.—There is no provision for the signature of the examination by the persons taking it.] None. The 450th and several subsequent sections down to s. 465, relate to the disposal of wrecks and the settlement of claims and disputes as to salvage, and payments to be made to the receiver. The fair conclusion to be deduced from all these provisions, is, that s. 448 only relates to examinations by the receiver into claims and disputes concerning wreck or salvage; and that any examination which may be taken by him under that section is made *prima facie* evidence under s. 449, so far as it relates to wreck or salvage. [BYLES, J.—If the salvors were suing in this court, you admit that the examination taken under s. 448 would be evidence, so far as this objection is concerned?] Yes. The admissibility of the examination must necessarily be limited to some extent. The question is, to what extent it is to be limited. [WILLIAMS, J.—There are somewhat similar provisions in the 26 G. 2, c. 19, s. 15, and 9 & 10 Vict. c. 99, s. 16, except as to making the examination admissible in evidence. ERLE, C. J.—The 465th section recognises a distinction between admissibility generally and admissibility in a limited form.(a) The \*legislature is there dealing [\*46 with that which can only be required for that one court. The only thing for which the document is admissible is beyond the scope of these sections. If the generality of the terms of s. 449 be not restrained, this examination might be produced without calling the captain. That never could have been intended. [WILLES, J.—The 270th section is material, as containing in the very same statute an

(a) "Whenever any appeal is made in manner hereinbefore (to the Court of Admiralty, s. 464) provided, the justices shall transmit to the proper officer of the court of appeal a copy on unstamped paper, certified under their hands to be a true copy, of the proceedings had before such justices, or their umpire, if any, and of the award so made by them or him, accompanied with their or his certificate in writing of the gross value of the article respecting which salvage is claimed; and such copy and certificate shall be admitted in the court of appeal as evidence in the cause."

express provision that the examination is not to be received where \*47] the party can be produced.(a)] \*That is found in a part of the statute which relates to "crimes committed on the high seas and abroad." [WILLIAMS, J.—It is clear that there is a class of judicial inquiries under which the examinations under s. 448 would be admissible as *primâ facie* proof. In the cases to which that section applies, it would be immaterial whether the party was alive or dead when the examination is used. BYLES, J., referred to s. 285, which enacts that "all entries made in any official log-book as hereinbefore (ss. 282, 288) directed, shall be received in evidence in any proceeding in any court of justice, subject to all just exceptions."] The statute in question is an aggregation of a great number of earlier acts; and it is quite impossible to reconcile all its parts. [ERLE, C. J.—The official log-book is admissible *secundum subjectam materiam*: s. 282.] Sections 291 to 329 are comprised in Part IV. of the statute, which bears the general heading "Safety and prevention of accidents." The 328th section, which refers to collisions, provides, that, "in every case of collision in which it is practicable so to do, the master shall immediately after the occurrence cause a statement thereof and of the \*48] circumstances under \*which the same occurred, to be entered in the official log-book (if any), such entry to be signed by the master, and also by the mate or one of the crew, and, in default, shall incur a penalty not exceeding 20*l*." Then, as to the other branch of the rule,—the cause was tried by a special jury, and there was evidence on both sides. [ERLE, C. J.—The learned judge reports to us that he was not satisfied with the verdict.] The question was one peculiarly for the jury; and their verdict ought not to be disturbed on light grounds.

*Brett, Q. C.*, in support of his rule.—The question as to the admissibility of these examinations is one of great importance. They are

(a) Section 270 enacts, that, "whenever in the course of any legal proceedings instituted in any part of her Majesty's dominions before any judge or magistrate, or before any person authorized by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceeding, then, upon due proof, if such proceeding is instituted in the united kingdom, that such witness cannot be found in that kingdom, or, if in any British possession, that he cannot be found in the same possession, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in Her Majesty's dominions, or any British consular officer elsewhere, shall be admissible in evidence, subject to the following restrictions, that is to say,—1. If such deposition was made in the united kingdom, it shall not be admissible in any proceeding instituted in the united kingdom,—2. If such a deposition was made in any British possession, it shall not be admissible in any proceeding instituted in the same British possession,—3. If the proceeding is criminal, it shall not be admissible, unless it was made in the presence of the person accused. Every deposition so made as aforesaid shall be authenticated by the signature of the judge, magistrate, or consular officer before whom the same is made; and such judge, magistrate, or consular officer shall, when the same is taken in a criminal matter, certify, if the fact is so, and (*sic*) that the accused was present at the taking thereof, but it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition; and in any criminal proceeding such certificate as aforesaid shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified; but nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any act of parliament, or by any act or ordinance of the legislature of any colony, so far as regards such colony, or to interfere with the power of any colonial legislature to make such depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible."

always admitted in collision suits in the Admiralty court. [WILLES, J.—The course of evidence in the Admiralty court differs from that of the courts of common law.] It is the common course now to examine witnesses *vivâ voce* in the Admiralty court. The log-book is not admitted, except against the vessel keeping it: but the statement made before the receiver is always admitted. The court is always anxious to get the earliest impressions of the persons who were on board at the time of the collision. The language of s. 449 is as general as may be: there is no pretence for saying that it is confined to wreck and salvage. The heading of this part of the statute shows that it applies to casualties which are neither wreck nor salvage. [WILLIAMS, J.—“Casualties” means, casualties or accidents which result in loss of life. The provision in question, except as to that part which makes the examination admissible in evidence, is taken from the 16th section of the 9 & 10 Vict. c. 99, which applies only to wreck and salvage.] The evidence in question may be material in an action against underwriters. [WILLIAMS, J.—If your argument be well-founded, the examination would be evidence against \*the captain or any of the crew upon an indictment for scuttling the ship.] There are no words to limit its admissibility to any particular court or as against any particular person. [BYLES, J.—It must be subject to all just exceptions.] Where the legislature have intended to limit the admissibility of a document, as in the case of the official log (s. 285), they have introduced the qualification, “subject to all just exceptions.” Entries in the log were always evidence against the owner, being made by one who is his agent for the purpose. [WILLES, J.—If the captain were dead, it would be evidence for the owners.] The 465th section, which has been already referred to, is another instance of the limitation of the admissibility of a document in evidence in terms, where such was the intention. [BYLES, J.—It is impossible to give full effect to the words of s. 449. Abundant force may be given to these examinations without violating our rules of evidence.] Then, the verdict was clearly against the weight of evidence. [BYLES, J.—I think it is a case in which there ought to be a further inquiry. It will be better to say no more. ERLE, C. J.—We are all agreed as to that. Upon the question as to the admissibility of the examination for the purpose for which it was offered, we will take a little time for consideration.]

*Cur. adv. vult.*

ERLE, C. J.—The question here is, whether, in an action for a collision, the examination of the captain of the plaintiff's ship, taken by the receiver of wrecks at Grimsby, under the 17 & 18 Vict. c. 104, s. 448, was admissible for the defendant, under s. 449, for the purpose of proving the fact that the damage to the plaintiff's ship from the collision was on her starboard bow; such fact being offered for the purpose of \*showing that the plaintiff's ship was in fault. [\*50 I think not, because the question which ship caused the damage to the other, was not a matter which the receiver had power to examine into under s. 448.

The jurisdiction here in question, “to examine,” is given to the receiver, when any ship is or has been in distress on our coasts, in respect of seven matters,—1. the name and description of the ship,—

2. the names of the master and owner,—3. the names of the owners of the cargo,—4. the ports or places from and to which the ship was bound,—5. the occasion of the distress of the ship,—6. the services rendered,—7. such other matters relating to the ship or cargo as the receiver thinks necessary.

The question whether the colliding part of the plaintiff's ship was the starboard or the port bow, appears to me irrelevant to each and all of these matters. An enactment altering the law as to evidence, and creating statutory evidence whereby the rights of parties may be defeated, must be construed strictly. The law of evidence, as it stands, is intended to maintain truth. Any alteration of that law for a particular purpose, is intended to maintain the truth in a better manner as far as that particular purpose is concerned, and no further; otherwise the alteration would have been carried further. The Merchant Shipping Act is a code of many laws relating to ships, and is divided into eight parts, and each part is subdivided into portions. Each part and portion is appropriated to a specified purpose. In several parts there are alterations of the law of evidence; and each alteration is adapted to the specific purpose of that portion where it occurs. For example, by s. 7, the seal of the board of trade is evidence of the making of all documents issued by the board of trade. This facilitates proof of the authenticity of the document. By s. 19, \*51] the \*inspectors may hold inquisitions, and report to the board of trade upon the matters therein specified. On these reports the board of trade may act in respect of matters under their superintendence. By s. 282, a provision is made against the loss of evidence from the evanescence of seafaring witnesses. Thereby the official log is required to contain, not only matters relating to the crew, but also every death, marriage, and birth on board, and every collision. And by s. 285 all entries in the official logbook shall be received in evidence in any court, saving all just exceptions. The admissibility of each of these entries must be regulated by the nature of the subject of the entry.

Part 8 contains the section now to be construed. By its title, it relates to wrecks, casualties, and salvage: and I gather from s. 432 that "casualties" here means casualties resulting in a death. Therefore, as far as the present question is concerned, the part may be taken to relate only to wrecks and salvage. This section in the first place contains a power in the inspecting officer to make inquiry, *inter alia*, whenever any ship causes damage to any other ship; and the result of this inquiry is to be sent in a report to the board of trade, and is not made admissible in evidence in any peculiar manner created by statute. Then follow the sections in question, 448 and 449, above mentioned.

It seems clear that section 448 did not authorize the receiver to inquire into the blame due to either party in a collision, because it had been before specifically provided for and assigned to the inspecting officer, as last mentioned. Under section 448, the inquiry by the receiver of wrecks into the seven matters above specified is for his guidance in performing the duties of his office connected with wreck. \*52] If that \*inquiry is confined strictly to these seven matters in their relation to ship and cargo, the result thereof would not be

likely to affect materially the rights of litigants by admissibility in all courts. It perpetuates *prima facie* evidence in relation to the identity of the ship and the voyage, and the occasion of distress. Under head 5, the receiver of wrecks may inquire into the cause of the distress; for instance, whether there is damage to the hull or the loss of a mast or of an anchor, and whether such damage was caused by stranding, or collision, or the like. But, for the purpose of the receiver of wrecks, the part of the ship where the damage was received is as immaterial as the quarter from which the wind was blowing at the time the damage was done.

I think his report is only evidence as to the matters into which it was his duty to inquire, and that the part of the hull supposed to be struck in the collision is not one of those matters.

Hearsay evidence is admissible for pedigree: but where the deceased parent told the child who were his father and mother, adding the place of his birth, the declaration was admissible only for the pedigree, not for the locality of the birth.

In the portion of Part 8 relating to salvage, provision is made for deciding on claims of salvage before justices of the peace by s. 461 and the following sections; and by s. 464 an appeal is given: and by s. 465 the justices may send a copy of the proceedings before them, and such copy is made evidence, but only for the court of appeal.

Upon this review of the statute, I think the rules of law relating to evidence are altered only for a specified purpose, and that the sections are drawn with great legal knowledge, confining each alteration to its own appropriate purpose: and, on this construction of [53] \*the act, the examination of the captain was not admissible as substantive evidence that in the collision the starboard bow of the plaintiff's ship was struck.

I do not advert to the other grounds of rejection: but, as this was the point made by the defendant's counsel, it suffices to decide it against him.

WILLIAMS, J.—I am of the same opinion. I think the evidence was properly rejected on the ground that it was sought to use it for a purpose as to which it was no part of the duty of the receiver of wrecks to inquire. It was urged by Mr. Brett, in support of his contention, that the language of s. 449 is general and without restriction,—that “any examination so taken in writing as aforesaid (s. 448), or a copy thereof, purporting to be certified under the hand of the receiver or justice before whom such examination was taken, shall be admitted in evidence in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, as *prima facie* proof of all matters contained in such written examination.” It is clear that these general words must be to some extent controlled; for, it never could have been intended to make matters spoken to by a witness otherwise than of his own knowledge,—mere hearsay,—admissible in evidence. It seems to me to be contrary to good sense and reason not to impose on the section the limit suggested by my Lord, viz., that such examination must relate to matters into which the receiver has by the statute and by the ordinary rules of law authority to inquire. The matter sought to be made evidence here is not such a one as the



receiver had any power to inquire into. Having taken this view, it seems to me to be unnecessary to give any opinion whether, looking \*54] to the history of this part of the statute, the true meaning of \*the 449th section is not that the examination under s. 448 shall be admitted in evidence where the inquiry before the receiver is limited to an inquiry touching wreck and salvage.

WILLES, J.—I am of the same opinion. It seems to me that the jurisdiction of the receiver under s. 448 is confined to an inquiry in cases of wreck and salvage into matters relating to the ship, her cargo and stores. That is expressly so stated in the introductory part of the section. He is to examine any person belonging to the ship, or any other person who may be able to give any account thereof, or of the cargo or stores thereof, touching the seven matters enumerated. His inquiry is to be limited, as one would have expected it would be, to an inquiry as to the ship and what belongs to her, which has been brought within his cognisance by reason of stress of weather. And that will appear still more clearly by a reference to s. 14, which provides that the board of trade may from time to time, whenever it seems expedient to them to do so, appoint a person as an inspector to report to them upon, amongst other things, the nature and causes of any accident or damages which any ship has sustained or caused, or is alleged to have sustained or caused. There, such an inquiry as it is suggested the receiver might enter into is expressly provided for by apt words,—words which leave no doubt that the 448th section was not intended to apply to the case of an inquiry as to who was in fault in the case of a collision which has caused the distress which brings the vessel under the cognisance of the receiver. I take it to be perfectly clear that the receiver has no right to inquire as to which party was in fault. It is true, the receiver may have jurisdiction to receive evidence of \*55] facts which may be relevant and material with reference to \*the inquiry as to who was in fault: and that is the ground upon which Mr. Brett insisted with the greatest apparent justice upon the admissibility of the receiver's report as to the fact of the injury to the plaintiff's vessel having been inflicted on the starboard side. But a moment's consideration will show that to hold that the examination is evidence because besides the inquiry as to the wreck it also is relevant to such a question as arises here, would be an unjust and almost absurd construction of the statute. The receiver has no jurisdiction to investigate the whole matter, including the question which party was in fault in a case of collision, and yet the examination is to be admitted "as *prima facie* proof of all matters contained therein." It must therefore be limited to matters which could legally be investigated before the receiver: and this is a matter which could not. We cannot impute to the legislature an intention to admit garbled evidence of a fact which was not properly a subject of inquiry before the receiver. This construction is consistent with the whole scope of the act of parliament. The 7th, 137th, 138th, 175th, 244th, 249th, 250th, 265th, 269th, 270th, 285th, 328th, and 528th are all sections relating to the admissibility of evidence; and they are limited to the admission of documents certified by official persons. When the legislature come to deal with other matters, the

log, for instance, they introduce the limitation "subject to all just exceptions." And s. 270, which provides for the reception of depositions in evidence, only makes them admissible under safe-guards and restrictions which are not provided in the section now under consideration. To hold, therefore, that this examination was admissible for the purpose for which it was tendered, would be not only inconsistent with the ordinary rules of evidence, but also inconsistent with the whole scope and frame of the statute.

\*BYLES, J.—I agree with the rest of the court, that notwithstanding the general and comprehensive words of the section [\*56 in question, there are limitations which must be implied. Agreeing as I do with the reasons given by the rest of the court, I do not hold myself precluded from considering, whenever the question may arise, whether there are not other limitations even within those. The result is that the rule will be made absolute only as for a verdict against evidence. Rule absolute accordingly.

### THE STEARINE KAARSEN FABRICK GONDA COMPANY v. HEINTZMANN and Another. June 13.

1. The defendants being employed as agents for the plaintiffs (a foreign company) to negotiate sales of candles for them in this country, conveyed to them an order from one S. for 2500 cases, to be delivered in London "free on board export ship: 2½ per cent. discount against bill at three days' sight: goods, invoice, and draft for acceptance to be sent to us." The plaintiffs did not in terms accept this proposal, but wrote to the defendants on the 19th of June as follows,—"*Les informations sur S. sont telles que nous ne pouvons lui livrer les 2500 caisses que contre connaissance. Si vous voulez, nous vous enverrons les connaissances, et vous ne les lui délivrerez que contre paiement.*" The defendants informed S. that the plaintiffs accepted the order on condition that he handed them (the defendants) a check in exchange for the bill of lading; and to this S. assented, provided he was allowed a discount of 3 per cent. instead of 2½, to which the plaintiffs agreed. On the arrival of the goods in London, the defendants caused them to be transhipped on board a vessel called the *Laurel* (named by S.) bound for Melbourne, taking the mate's receipt in their own names. They afterwards tendered that document to S. and demanded payment, which he promised to make on the following Saturday. S., however, failed to pay according to his promise, and the *Laurel* sailed to Melbourne with the goods on board.

Under the instruction of the judge, the jury found that the meaning of the plaintiffs' letter of the 19th of June was, that the defendants were not to part with *the goods* out of their possession or control, until they had received the price thereof from S.:—

Held, that the conduct of the defendants amounted to a breach of their contract with the plaintiffs; that there was no misdirection; and that the proper measure of damages was the value of the goods.

2. It is not competent to a witness who is called to *interpret* a foreign document, to give an opinion as to its *construction*: that is for the court.

THIS was an action against the defendants for an alleged breach of duty in their character of agents.

The declaration stated, in substance, that, in consideration that the plaintiffs would employ the \*defendants to sell and deliver certain goods to one Sichel, they the defendants promised not to [\*57 deliver the said goods to him without payment of the price thereof: Breach, that they had so delivered them without payment, whereby the plaintiffs lost the goods.

Pleas,—first, a denial of the promise as alleged,—secondly, a denial of the delivery of the goods to Sichel as alleged. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after last Hilary Term. It appeared that the plaintiffs, a company in Holland engaged in the manufacture of candles, were in the habit of sending goods to this country for shipment abroad, and that, since the year 1861, the defendants, Messrs. Heintzmann & Rochussen, had acted as their agents here.

One Sichel having proposed to purchase of the company through the defendants 2500 boxes of candles for shipment to Melbourne in two parcels "free on board export ship," at certain prices named, with  $2\frac{1}{2}$  per cent. discount, the defendants communicated his offer to the plaintiffs in the following letter:—

"London, 1st June, 1863.

"De Stearine Kaarsen Fabriek Gonda.

"Below we hand you confirmation of the order of 2500 boxes, the half of which are to be shipped at your earliest convenience, the other half one month later.—

"1/6496. G. Sichel, 36, Old Broad Street.

"G. S. 11 and upwards, quality and label in every way as shipped under mark S. per Maaslings & Ornust.

"1250 boxes 6. 16 oz. net. }  
"1250 boxes 6. 13 oz. net. } at  $8\frac{1}{2}d.$  per lb.

"Free o. b. export ship.  $2\frac{1}{2}$  per cent. discount against bill at three days' sight.

"Two shipments of 625 boxes 16 oz. }  
625 " 13 oz. } one mo. apart.

\*58] "Goods, invoice, and draft for acceptance to be sent to us.  
HEINTZMANN & ROCHUSSEN."

Some correspondence then ensued between the company and Messrs. Heintzmann & Co., which contained nothing material: and on the 19th of June, the plaintiffs wrote to them as follows:—

"Les informations sur Gustave Sichel sont telles que nous ne pouvons lui livrer les 2500 caisses que contre connaissance. Si vous voulez, nous vous enverrons les connaissances, et vous ne les lui délivrerez que contre paiement."

Again, on the 27th of June, the plaintiffs wrote to Heintzmann & Co. as follows:—

"Nous sommes en état d'accorder des frets pour Melbourne à raison de 35s. in full par 40 pieds cubes Anglais. Si M. Sichel veut expédier ces bougies par Rotterdam à Melbourne moyennant le fret mentionné, nous voulons lui livrer les 2500 caisses au lieu de  $8\frac{1}{2}d.$  par 16 ounces, at  $8\frac{1}{2}d.$  franco à bord du navire Hendrick Ido, Ambent, partant fin Juillet, de Rotterdam."

On the 29th, Heintzmann & Co. wrote to the plaintiffs as follows:—

"Repondant à votre estimée du 27, &c. M. G. Sichel demande ses bougies comme convenue ici, et pour paiement contre connaissance stipule un escompte extra de  $\frac{1}{2}$  pour cent."

The goods were forwarded to London on board the Finourd, with a bill of lading making them deliverable to Heintzmann & Rochussen or assigns, and a bill on Sichel for the amount payable at sight. On their arrival, on the 8d of August, Heintzmann & Rochussen took the bill of lading and the draft to Sichel. The latter said he was only to pay against the mate's receipt, and he named the Laurel as

the vessel into which the candles were to be transhipped \*for Melbourne. The goods were accordingly put on board the <sup>[\*59]</sup> Laurel on the 5th and 6th of August, and a mate's receipt for them obtained. Sichel made some objections to the quality of the candles; but ultimately he promised to pay for them on Saturday the 8th of August. He did not, however, perform his promise; and the Laurel sailed for Melbourne on the 8th, with the candles (uninsured) on board, no bill of lading having been signed for them.

On the part of the defendants it was submitted that there was no such contract as alleged, and no breach of such contract as proved. It was further contended that the contract being for a sale of goods "free on board" the export ship, the defendants were bound to ship them on board the Laurel; that the word "les," in the letter of instructions of the 19th of June referred to the "connaissements," which it was submitted meant the shipping documents, in this case the mate's receipt.

M. Delpierre, the Belgian consul, was called for the purpose of translating the letter above mentioned. He was asked to what the article "les" referred, and he said it was applicable to the "connaissements."

Upon its being objected on the part of the plaintiffs that it was not competent to the defendants to call a witness to explain the meaning of the document, the Lord Chief Justice rejected the evidence, observing that it was for the witness to translate the document, but that its construction was for the judge.

His lordship left the whole case to the jury, telling them, that, in his opinion, "les" referred to the *goods*, and that there was some evidence of the promise alleged in the declaration, and of a breach thereof by the defendants.

The jury returned a verdict for the plaintiffs for the value of the goods, 1000*l.* and upwards.

\**The Hon. G. Denman*, Q. C., in Easter Term last, obtained <sup>[\*60]</sup> a rule nisi for a new trial, on the ground that his Lordship misdirected the jury,—first, in leaving to them the construction of the letter of the 19th of June,—secondly, in telling the jury that the word "les" in that letter referred to the "goods" therein mentioned,—thirdly, in telling the jury that there was evidence of the promise alleged in the declaration,—fourthly, in telling the jury that there was evidence of the breach alleged,—fifthly, in allowing the jury without evidence to give a verdict for the full amount claimed. He also asked for a rule on the ground of the improper rejection of the evidence of M. Delpierre; referring to Taylor on Evidence, 3d edit. § 1059, where it is said, that, "if the language, whether as being foreign, obsolete, technical, local, or provincial, is either not understood by the court, or is capable of bearing two or more interpretations,—the testimony of persons skilled in deciphering writings, or who understand the language in which the instrument is written, or the ancient, technical, local, or provincial meaning of the terms employed, is admissible to interpret the characters, or to translate the instrument, or to testify the proper meaning of particular expressions." [BYLES, J.—This was an attempt to give evidence of construction under the guise of a translation. ERLE, C. J.—In the Duchess di

Sora v. Phillips, 33 Law J., Ch. 129, it was held by the House of Lords, that, in the construction of a foreign document in the English courts, the judge or court must obtain, first, a translation of the document, secondly, an explanation of any terms of art used in it, thirdly, information on any special law, and, fourthly, on any particular rule of construction of a foreign state affecting it: and it is the duty of the English court with such light to construe the document.(a)]

\*61] Upon this point the rule was refused.

*Lush*, Q. C., and *Sir G. Honyman*, on a subsequent day, showed cause.—The facts show an inexcusable breach of the defendants' contract and their duty as agents. Their instructions in substance were, not to part with the goods out of their control without first obtaining payment for them. How have they obeyed those instructions? They have put the goods on board a vessel named by Sichel, and have allowed them to be taken to Australia uninsured and not paid for. [WILLES, J.—The sale was "free on board." The defendants were bound to put them in that position before they could properly call on Sichel for payment. The goods are not under the control of Sichel, he not having the mate's receipt.] The defendants have broken their promise; for, they have parted with the goods without obtaining payment for them. [KEATING, J.—The goods are still the plaintiffs' goods.] They will be, no doubt, if the plaintiffs do not retain their verdict. [BYLES, J.—The word "connaissance" is used twice in the letter of the 19th of June. Taking the whole of that letter, does it not mean, "Do not part with the goods without a bill of lading,—connaissance,—and do not part with the bill of lading without obtaining cash"?] It means, "Do not part with the control over the goods until you have obtained payment." [WILLES, J.—The letter of the 27th of June rather tends to confirm the suggestion of my Brother Byles.] The expression "free on board" only means that the goods shall be delivered alongside the export ship at the expense of the sellers. The defendants should not have put the goods on board the *Laurel* without having the cash against the bill of lading. As to the damages, the value of the goods, which are lost to the plaintiffs, was clearly the only proper measure.

\*62] *Denman*, Q. C., *C. Pollock*, and *Tayler*, in support of the rule. —There was no such contract as that alleged in the declaration, and no such breach as to make the defendants liable. The question is, what is the meaning of the letter of the 19th of June,—"*Les informations sur Gustave Sichel sont telles que nous ne pouvons lui livrer les 2500 caisses que contre connaissance. Si vous voulez, nous vous enverrons les connaissances, et vous ne les lui délivrerez que contre paiement.*" "*Connaissance*" means "Shipping document of title"—*Tullet et Oiseau*, Dictionnaire des Termes de Droit.(b) [WILLES, J.—That is taken from the Code Maritime.] It means document of title for the time being. It is plain from the defendants' letter of the 29th of June, that they so understood it. That the pro-

(a) Cited, *Taylor on Evidence*, 3d edit. § 1280 A.

(b) In the Dictionnaire de l'Académie Française, "*Connaissance*," is thus defined,—"*Déclaration contenant un état des marchandises chargées sur un navire, le nom de ceux à qui elles appartiennent, l'indication des lieux où on les porte, et le prix du fret.*" "*Tous les connaissances,*" it is added, "*sont signés par le capitaine et par le chargeur.*"

perty in the candles did not pass to Sichel by their being put on board the Laurel, is clear from *Wait v. Baker*, 2 Exch. 1, *Browne v. Hare*, 4 Hurlst. & N. 822, and *Turner v. The Trustees of the Liverpool Docks*, 6 Exch. 548. In *Abbott on Shipping*, 8th edit. 526, 10th edit. 402, it is said: "It sometimes happens that goods intended for exportation are sold under a contract to deliver them on board a vessel named by the buyer. In such a case, the seller may retain his property in the goods by taking a receipt for them from the person in charge of the ship, so long as he keeps this receipt in his own hands, the shipment not being under such circumstances a complete delivery to the buyer: *Craven v. Ryder*, 6 Taunt. 433, 2 Marsh. 127. He will also retain his right to \*the goods, at least as [\*63 against the master of the ship, if he demand a receipt in his own name at the time of the shipment, although the receipt be not delivered, and the master afterwards sign and deliver a bill of lading to the buyer, who becomes insolvent before the departure of the ship: *Ruck v. Hatfield*, 5 B. & Ald. 682 (E. C. L. R. vol. 7)." (a) In *Cowas-jee v. Thompson*, 5 Moore's P. C. 165, goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, *at the option of the purchasers*, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, *who elected to pay for the goods by a bill*, which the sellers having drawn was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading *in the purchasers' names*, who, while the bill they accepted was running, became insolvent. Under these circumstances, it was held by the judicial committee of the privy council (reversing the verdict and judgment of the supreme court at Bombay) that trover would not lie for the goods, for that, on their delivery on board the vessel, they were no longer in transitu, so as to be stopped by the sellers; and that the retention of the mate's receipts by the sellers was immaterial, as, after *their election to be paid by a bill*, (b) the receipts of the mate were not essential to the transaction between the sellers and purchasers. Lord Brougham, in delivering judgment, there says,—p. 176,—"Craven v. Ryder differs materially from the present case, in having an order from the sellers to the captain 'to receive the goods for and on account of the plaintiffs' (the sellers), and in the receipt [\*64 expressly stating that \*they were received for and on account of the sellers: and it was proved that this form had been recently adopted, for the express purpose of giving the shipper a command over the goods until the receipt should be given up for the bill of lading. It is true, Gibbs, C. J., says he should have held the same opinion had the receipt been in the old form; yet he says the change is a circumstance to be considered. Nor can we argue that it is otherwise than an important distinction between that case and this. Dallas, J., who tried the cause, said the jury were clear that the plaintiff never had parted with the possession; so that he considered the fact of continuing possession as having been left to them. Moreover, there was evidence in the present case, that, by the custom of the

(a) See *Joyce v. Swann*, post, p. 84.

(b) The election was the other way. A similar mistake occurs in the judgment, at p. 174.

trade, when goods were sold 'free on board,' the buyer is considered as the shipper, though the seller is to carry them for him to the vessel: and we know not if any such evidence was given in *Craven v. Ryder*. If that judgment be understood to hold this evidence immaterial, then we are unable to concur with it. The question in all the cases between buyer and seller, which is the case here, is, whether or not anything remained to be done as between these two parties. The importance of keeping that in view, and always attending to this, whether the question arises between these two persons, or between one of them, the seller, and some third party, is well stated by Le Blanc, J., in *Busk v. Davis*, 2 M. & Selw. 403, and *Whitehouse v. Frost*, 12 East 621. In the present case, it is quite clear that nothing whatever remained to be done between the buyer and seller, unless it be that the former ought most certainly to have delivered up the mate's receipt, which he wrongfully or by oversight kept possession of, without the shadow of a right to it: and whether it be wrong or \*65] error, he is not the party to take "advantage of this." Here the mate's receipt was made out in the names of the defendants as the agents of the plaintiffs. The ambiguity, if any there be, is the fault of the plaintiffs themselves. The words "contre connaissance," in the first part of the letter of the 19th of June, if they mean anything, must mean "against the Australian bill of lading," for that would be the only document the purchaser could have to countervail the delivery of the goods on board the export ship. The defendants, therefore, it is submitted, have fully and completely carried out their instructions, in preventing the goods from being at the control of the buyer. At all events, the damages are excessive: the goods are still subject to the control of the shippers, and, for anything that appears, may still realize enough to pay the invoice price and all charges. [WILLES, J.—If the plaintiffs are entitled to a verdict at all, I do not see how it can be for less than the value of the goods. By the defendants' breach of contract, they have been sent to a place to which the plaintiffs never intended them to go.] *Our. adv. vult.*

ERLE, C. J., now delivered the judgment of the court: (a)—

This was a rule for a new trial, on the ground of misdirection.

The declaration alleged, that, in consideration that the plaintiffs would employ the defendants to sell and deliver certain goods to one Sichel, they the defendants promised not to deliver the said goods to him without payment of the price thereof, yet they had so delivered them without payment. The pleas denied the promise and the breach.

\*66] \*It appeared that the goods in question were consigned by the plaintiffs with a bill of lading to the defendants for Sichel, and the defendants put the goods on board the *Laurel*, a ship named by Sichel, and kept the mate's receipt, and that the *Laurel* sailed before Sichel had paid or any bill of lading on board that ship had been made out, and the goods could not be found; and this action was brought to recover their value from the defendants. The judge left the issues to the jury; and they found for the plaintiffs.

The rule nisi was granted on five grounds of misdirection,—first,

(a) The judges present at the argument were, Erle, C. J., Willes, J., Byles, J., and Keating, J.

for leaving the construction of the letter of the 19th of June to the jury,—secondly, in telling the jury that the word “les” in that letter referred to the goods,—thirdly and fourthly, in leaving the issues on the contract and on the breach to the jury, without any evidence to support them,—fifthly, in allowing the jury to give for damages the value of the goods and the loss sustained in respect of a draft for their price.

After hearing the argument on that rule, we are now to decide whether any of those grounds for a new trial have been established: and our decision is in the negative.

The main question is, whether there was evidence of the contract declared on. The plaintiffs, in support of the affirmative, adduced the oral evidence of Mr. Wachter, and several letters: and we are of opinion that the whole of that evidence, including the letter of the 19th of June, was properly left to the jury.

The terms on which the defendants became agents of the plaintiffs appeared by the defendants’ letter of the 9th of August and Mr. Wachter’s statement. The defendants were to have a commission on all orders obtained through them; and the plaintiffs reserved to themselves the right to make inquiries before they \*accepted [\*67 any order proposed to them by the defendants.

The following letters show the order here in question:—On the 30th of May, 1863, Sichel wrote to the defendants to propose an order for 2500 boxes of candles in two shipments, “free on board export ship, at certain prices, with 2½ per cent. discount.” On the 1st of June the defendants proposed this order to the plaintiffs,—“Free on board export ship: 2½ per cent. discount, against bill *at three days’ sight*: goods, invoice, and draft for acceptance to be sent to us.” This order was never finally accepted by the plaintiffs: but, after intermediate correspondence not important, on the 19th of June they wrote to the defendants,—“The information about Sichel is of such a nature that we cannot deliver the boxes except against bill of lading. If you like, we will send you the bills of lading, and you will not deliver them to him but upon payment.”

These were the instructions upon which the defendants were bound to act in their dealings with Sichel on behalf of the plaintiffs; and they show the contract of the defendants for breach of which they are now sued.

The jury have in effect found (and, if the question was for us, we are of the same opinion as the jury,) that the defendants were thus instructed not to part with the goods out of their possession or control till they had received the price thereof from Sichel. The goods were to be consigned in two shipments from Rotterdam to London, with bills of lading making them deliverable to the defendants. Sichel was not to have the boxes except against those bills of lading; and those bills of lading were not to be delivered to Sichel till he had paid the price. That the plaintiffs so understood it, is clear from the documents they sent, viz., bill of lading for the shipment to London, with invoice, “payable au \*comptant,” and draft at sight. So the defendants understood it; for, by letter of the 22d of [\*68 June, they informed Sichel that the plaintiffs accepted the order on condition that he handed a check to the defendants in exchange for



bill of lading; and to this Sichel consented provided he was allowed 3 per cent. instead of 2½ per cent. discount; and to this the plaintiffs consented: and then, and not till then, the contract was made.

Furthermore, when the goods arrived, the defendants sent bill of lading, invoice, and draft at sight; and, if Sichel had accepted the draft and paid it against bill of lading, according to invoice, the defendants would have fulfilled their instructions. But they were induced by Sichel to place the goods on board an export ship named by him, without receiving the price; and thereby the loss was caused.

The defendants contended that they had fulfilled their instructions, because they had kept the bills of lading of the Dutch ship, and had kept the mate's receipt of the Australian ship, and so prevented Sichel getting the goods represented by that mate's receipt. But, in the opinion of the court and the jury, the letter of the 19th of June does not support this contention; the substance thereof being as above stated.

Some confusion was introduced, from assuming that the contract had been made as proposed in the letter of the 1st of June, with the term that the goods should be delivered "free on board" the export ship. But that letter was answered by the letter of the 19th of June; and no contract was formed until the subsequent letters had passed relating to the discount, as above mentioned: and the duty to receive the price before parting with the possession or control of the goods was plainly declared by the letter of the 19th of June, and was not altered by the subsequent letters relating to the discount to be allowed.

\*69] \*In coming to the conclusion that there was evidence on which the jury might find that the contract was made in substance as alleged, we have in effect decided that there was also evidence on which they might find that the breach was proved. It also follows, in our opinion, that the jury were right in giving the value of the goods, which were lost to the plaintiffs, and the expenses incurred by them in respect of the bill of exchange for the price drawn according to the terms of the letter of the 19th of June.

An argument was founded on the meaning of the French pronoun "les," in the letter of the 19th of June. The letter is in these terms:—"Les informations sur Gustave Sichel sont telles que nous ne pouvons lui livrer les 2500 caisses que contre connaissance. Si vous voulez, nous vous enverrons les connaissements, et vous ne les lui délivrerez que contre paiement."

The word "connaissance" was alleged at the bar to be a general term comprehending any admission of the receipt of goods on board a vessel, such as a mate's receipt. But that appears to be a mistake. The appropriate general word to express a receipt or admission, and comprehending a mate's receipt, is "reconnaissance:" but the word "connaissance" has a well-known restricted and peculiar meaning. "Reconnaissance" is the genus; "connaissance" the species. "Connaissance," not only in popular French, but in French law, is said to mean bill of lading: see Code de Commerce, tit. 7, *Du Connaissance*, Art. 281.

An objection was made, that the learned judge had in effect led the

jury to understand that the pronoun "les" in the last clause of the letter meant the goods; whereas, it was said to refer to some bill of lading or mate's receipt, so as to prevent the defendants' conduct \*from being a breach of their contract with the plaintiffs.

We do not advert specifically to these suggested meanings, [\*70 because we dissent from them. The meaning is, that we, the plaintiffs, will send you the Dutch bills of lading, and you will not deliver "them," that is, those bills of lading, to him till you have got the price. This instruction not to deliver the Dutch bills to Sichel without the price, was *à fortiori* an instruction not to part with the control of the goods represented by those bills of lading, till the price was paid. If, on tender of those bills of lading, the price was not paid by Sichel, he had no right to the goods under the contract, and the defendants did wrong in putting them on board the ship named by him in the course of a delivery to him, whereby they lost possession of or at least control over the goods, and a direction was given to them, as requested by Sichel, contrary to the instructions of the plaintiffs. In this view, the letter had in effect the meaning which it is alleged that the judge offered to the jury to be adopted or not by them as they should decide.

Upon this construction of the effect of the evidence, the declaration is in substance right. If any amendment was needed, it would not affect the rights of the parties to the cause, but would be made by the court, as a matter of course, without costs. On these grounds the rule is discharged. Rule discharged.

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\*KOEDEL v. SAUNDERS. June 23. [\*71

It is not a condition precedent to the attaching of a policy on goods against sea-risks, that the subject of insurance should at the commencement of the voyage be fit to encounter the ordinary vicissitudes of a voyage.

THIS was an action upon a policy of insurance at and from any port or ports, place or places in Cochin, to Marseilles, with leave to call and stay for all purposes at all or any ports or places on either side of, at, and beyond the Cape of Good Hope, and with all risk of craft, upon any kind of goods and merchandises by the ship Flore, beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above, and to continue and endure until the said ship and goods and merchandises whatsoever should be arrived at as above, and until the said goods and merchandises should be there discharged and safely landed. And it was provided by the policy that it should be lawful for the said ship, &c., in the said voyage to proceed and sail to and touch and stay at any ports or places whatsoever, and for all purposes, without prejudice to the said insurance. And the said insurance was thereby declared to be on cocoa-nut oil and [or] cargo of produce as interest might appear, value to include 10 per cent. advance on invoice and charges: produce (oil excepted) warranted free from particular average, except the vessel should be sunk, burnt, or stranded; to pay general average as per foreign statement: warranted to sail on or before the 1st of January, 1863.

The declaration stated, that, in consideration of the payment by the plaintiff to the defendant of a certain premium at and after the rate aforesaid [30s. per cent.] for the insurance of 200*l.* upon and in respect of the premises, upon the terms aforesaid, the defendant then became and was an insurer to the plaintiffs accordingly, and duly subscribed the said policy as such insurer of the sum of 200*l.*; that, \*72] before the happening \*of the loss thereafter mentioned, divers goods, to wit, cocoa-nut oil and coprah, being goods covered by the said policy, had been and were loaded on board the said vessel, to be therein carried on the voyage mentioned in the said policy, and that the plaintiff at the time of the making of the policy and of the commencement of the said risk, and thence continually until and at the time of the loss thereafter mentioned, was interested in the subject-matter of the said insurance to the value and amount of all the moneys ever insured thereon, and that the said insurance was made for the use and benefit and by the order of and on account of the plaintiff; that, after the commencement of the said risk, and during its continuance, and while the said policy was in full force, the said goods were, by divers of the perils insured against, wholly lost,—of all which the defendant had notice; that, before this action was brought, all warranties had been complied with, and all conditions were fulfilled, and all things were done and happened, and all times elapsed, necessary to entitle the plaintiff to be paid by the defendant the said sum of 200*l.* so insured by him, and to sue him for the non-payment thereof thereafter mentioned; yet that the defendant had not paid the said sum of 200*l.*, or any part thereof, and the same remained wholly unpaid and in arrear, contrary to and in violation of the terms and provisions of the said policy of insurance.

Fourth plea,—that the said premises so insured as aforesaid were not seaworthy for the said voyage at the time the said ship departed and set sail thereon.

To this plea the plaintiff demurred, the grounds of demurrer stated in the margin being,—“that there is no implied warranty of the seaworthiness of the goods insured by a policy; and that the plea does not allege that the loss was attributable to the condition of the goods.” Joinder.

\*73] \**Sir G. Honyman*, in support of the demurrer.(a)—This is the first time it has been suggested to be an implied warranty on an insurance of goods, that at the commencement of the voyage the goods were seaworthy. [He was stopped by the court, who called upon

*Watkin Williams* to support the plea.(b)—In an insurance on a

(a) The points marked for argument on the part of the plaintiff were as follows:—

“1. That, in a policy on goods, there is no implied warranty that the goods are seaworthy:

“2. That the plea does not allege that the loss was attributable to the condition of the goods:

“3. That the plea admits that the goods were lost by the perils insured against, and does not aver anything to relieve the underwriters from responsibility.”

(b) The points marked for argument on the part of the defendant were as follows:—

“1. That it is a condition precedent to the attaching of a policy of insurance on goods against sea-risks, that the subject of insurance should at the commencement of the voyage be fit to encounter the ordinary vicissitudes of a voyage:

“2. That the plea shows that the subject of insurance was not fit to encounter the ordinary vicissitudes of a voyage, and therefore the policy never attached.”

voyage policy upon goods, it is an implied condition that they shall be seaworthy at the commencement of the voyage,—that they shall be in a fit state to encounter the ordinary perils incident to the voyage. [WILLES, J.—Is not “seaworthy” a term of art which is inapplicable to goods?] In *Park on Insurance*, 8th edit. 458, it is said: “There is in the contract of insurance a tacit and implied agreement that everything shall be in that state and condition in which it ought to be: and therefore it is not sufficient for the insured to say that he did not know that the ship was not seaworthy; for he *ought* to know that she *was* so at the time he made the insurance. The ship is the substratum of the contract between the parties: \*a ship not capable of performing the voyage is the same as if there were no [\*74 ship at all: and, although the defect may not be known to the person insured, yet, the very foundation of the contract being gone, the law is clearly in favour of the underwriter, because such a defect is not the consequence of any external misfortune, or any unavoidable accident arising from the perils of the sea, or any other risk against which the underwriter engages to indemnify the person insured.” So, in *Arnould on Insurance*, 2d edit. 689, it is laid down, that, “in every policy of sea insurance on a voyage, there is an implied warranty that the ship shall be seaworthy for the voyage when she sails; by which is meant that she shall be in a fit state as to repairs, equipments, crew, and all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing on it,”—citing *Wedderburn v. Bell*, 1 Campb. 1; *Christie v. Secretan*, 8 T. R. 192. The same reasoning is equally applicable to an insurance on goods as to an insurance on ship. It is assumed that when shipped the goods are in a fit state to bear the voyage. There is one case of that sort in the books, and one only, viz., *Oliver v. Cowley*, before Lord Mansfield at the Guildhall sittings after Trinity Term, 1765, which is thus given in *Park on Insurance* 470:—“An action was brought by an innocent shipper of goods (no part-owner of the ship) against the underwriter, and the policy was effected on goods in the *Amy* and *Lætitia* at and from Montserrat to London. It appeared that the ship sailed on the 26th of July, and next day, *without any bad weather*, she was very leaky, and obliged to run for St. Thomas's, one of the Virgin Islands, where she was unloaded, and the goods, being much damaged, were sold. It could not but be allowed on all sides that the ship was not seaworthy to undertake the insured voyage; and it was agreed and admitted by defendant that the shipper of the goods was a stranger to it when the \*goods were shipped. The plaintiff [\*75 was nonsuited, Lord Mansfield saying that the implied warranty could not be dispensed with in any case; that it was a point of law, and, if the plaintiff's counsel thought there was any ground to go upon, he would save the point. But the plaintiff's counsel declined this, being satisfied the question was clear against them. The plaintiff was nonsuited.”(a) In *Boyd v. Dubois*, 3 \*Campb. 133, [\*76 Lord Ellenborough says,—“If the hemp was put on board in a

(a) This loose note is inserted by the editor without any comment. But, in the next paragraph, he says,—“In a late case, the law respecting the implied warranty of seaworthiness was accurately stated, and the reason for it clearly illustrated, by Mr. Justice Lawrence. The learned judge said,—‘I also doubt whether there is any analogy between a case like the pre-

state liable to effervesce, and it did effervesce and generate the fire which consumed it, upon the common principles of insurance law, the assured cannot recover for a loss which he himself has occasioned." In 3 Kent's Commentaries 287 (10th edit. 391), it is said: "There is in every policy an implied warranty that the ship is seaworthy when the policy attaches. This means that the vessel is competent to resist the ordinary attacks of wind and weather, and is competently equipped and manned for the voyage, with a sufficient crew, and with sufficient means to sustain them, and with a captain of general good character and nautical skill. It is also an implied condition that the goods, tackle of the ship, &c., shall be properly stowed." In Gibson v. Small, 4 House of Lords Cases 353, 384, Erle, J., thus defines seaworthiness:—"A ship, before setting out on a voyage, is seaworthy, if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage, unless it met with extraordinary damage." And Maule, J., at p. 388, says,—“It appears to me that the foundation of the admitted rule, that, in a policy on a voyage, there is an implied condition or warranty that the ship was seaworthy at the beginning of the voyage, is, that the parties to the policy are to be considered as contracting with reference to what is usual and of course in the transaction which is the subject of the policy; and that it is usual, and a matter of course, to make a ship seaworthy before the commencement of a voyage.” All this is just as applicable to an insurance on goods as to an insurance on ship. Until the cases of Thompson v. Hopper, 6 Ellis & B. 172 (E. C. L. R. vol. 88), and Fawcus v. Sarsfield, 6 Ellis & B. 192, it was never distinctly decided \*77] that there is no implied warranty of seaworthiness in a time-policy: and therefore it is no answer to say that such a plea as this has never before been pleaded.

WILLES, J.—This is an action upon a policy of insurance on goods, to which the defendant has pleaded “that the said premises so insured as aforesaid were not seaworthy for the said voyage at the time the said ship departed and set sail thereon.” To this plea the plaintiff has demurred; and the question is whether the plea furnishes a sufficient answer to the action. I am of opinion that it does not. It might be sufficient to dispose of the matter by saying that the plea is a novelty. It is novel not merely with reference to the circumstances, sent and cases where there is an implied warranty of seaworthiness. The latter is implied from the nature of a contract of insurance. The consideration of an insurance is paid in order that the owner of a ship, *which is capable of performing her voyage*, may be indemnified against certain contingencies; and it supposes the possibility of the underwriter gaining the premium; but, *if the ship be incapable of performing her voyage*, there is no possibility of the underwriter's gaining the premium: and, if the consideration fails, the obligation fails. In the case of the Mills Frigate (Mills v. Roebuck, Marsh. Inst. 154, Park Ins. 460, 8th edit.), it was said that the ship's being capable of performing the voyage was the substratum of the contract of insurance. So, if a ship sail without a sufficient crew, she is incapable of performing the voyage:” Christie v. Secretan, 8 T. R. 192. Still better is the rule expressed in the summing up in the American case of Prescott v. The Union Insurance Company, 1 Wharton 399.

The case of Oliver v. Cowley is also cited in Shee's edition of Marshall on Insurance 114, without observation. At the same page occurs this passage,—“If it be clearly ascertained that the ship at the time of her departure was not in a condition to perform the voyage insured, neither the innocence nor ignorance of the insured, nor any precautions he may have taken to make her seaworthy, will avail him against the breach of this implied warranty.” But in this chapter the author is treating of the insurance on ship.

but also in its character, and in the principle which it seeks to affirm. Questions of every kind so frequently arise in actions upon policies, that the ingenuity of counsel would doubtless have furnished one instance at least of an attempt to plead such a plea, if it had not been thought idle. But, with the exception of the short note of *Oliver v. Cowley*, which I utterly repudiate, no such defence is suggested in the whole history of insurance law. Apart, however, from its novelty, the plea is altogether inadmissible. It seeks to introduce into the contract of insurance a new implied warranty which is at variance with all principle. As a general rule, the insurer is not liable for damage resulting from a peculiar vice or infirmity in the thing which is the subject of insurance. It is upon that footing that the seaworthiness of the ship is held in our law, as well as in that of most commercial countries, to be an implied warranty. It is a sufficient answer to the assured to show that the vessel was unseaworthy when she sailed on her voyage, without going on to show that the damage sustained was the consequence of \*that unseaworthiness. But, in the case of an insurance on goods, it is no answer [\*78 to say that they were in an unfit condition to be shipped, unless it is shown that the loss arose from that unfitness. In *Smith's Commercial Law*, 5th edit. 346, it is laid down, upon the authority of *Boyd v. Dubois*, 3 Campb. 133, that, "if goods be put on board in a damaged condition, and are in consequence liable to effervesce and generate the fire by which they are consumed, the underwriters are not liable." Nothing can be more distinct than the rule of insurance law, that it is a warranty or condition that the vessel shall be seaworthy at the time she sets out on her voyage. That involves a competent captain and crew, and a sufficiency of stores and provisions. If there be any failure in this respect, the underwriters are discharged, though the loss is in no respect attributable to the unseaworthiness. That is the distinction between an insurance on ship and an insurance on goods. Suppose a cargo of cotton shipped at New Orleans—I am assuming a state of things which it is to be hoped may soon return,—for this country in such a damp state as to be liable to spontaneous ignition, so that she could not continue her voyage without a strong probability that she would catch fire, but either the dampness was unknown or its probable consequences not foreseen; and suppose the vessel caught fire in the course of the voyage from some cause altogether remote from the condition of the cargo. That would be a case in which,—fraud or misrepresentation or concealment apart,—the underwriters would be clearly liable, unless we are to introduce the new implied warranty which is attempted to be set up here. I for one will not consent to lend myself to the introduction of a novelty the consequences of which it is difficult to foresee. I think the plaintiff is entitled to judgment.

\**BYLES, J.*—I am of the same opinion. In a great deal that Mr. Williams has said I fully concur, viz., that a loss of goods [\*79 which perish by some inherent vice or weakness, as in the case of tender animals unfit to bear the agitation of the sea, gun-cotton, or the like, or in the more ordinary instances of fruit, flour, or rice, which are liable to heat or perish on the voyage, is not a loss by perils of the sea. The proper mode of meeting such a case is by the

ordinary plea that the goods were not lost by a peril insured against. It is said that this plea is a novelty. I have not time to look into it, but I incline to think that the very case is provided for by the French Code de Commerce.<sup>(a)</sup> However, I quite agree with my Brother Willes as to the inexpediency of encouraging the introduction of a new plea like this.

KEATING, J., concurred.

Judgment for the plaintiff.

(a) See Code de Commerce, Tit. x. *Des Assurances*, § 1, art. 352: "Les déchets, diminutions, et pertes qui arrivent par le vice propre de la chose, et les dommages causés par le fait et faute des propriétaires, affréteurs, ou chargeurs, ne sont point à la charge des assureurs." In the commentary on this article by the editors, MM. Toulet, D'Avilliers, et Sulpicy, it is said,—"Mais il a été jugé avec raison que les assureurs d'une marchandise, sujette par sa nature à se détériorer, sont responsables de l'aggravation que son vice propre peut recevoir des événements de mer mis à leur charge par la loi."

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\*80] **\*HOUGHTON v. THE LONDON AND COUNTY ASSURANCE COMPANY, LIMITED.** *June 8.*

Inspection under the 50th section of the Common Law Procedure Act, 1854, will only be allowed where it is reasonably shown that the documents sought to be inspected really exist, and are relevant to the case of the party seeking the inspection.

THIS was an action against the defendants for wrongfully dismissing the plaintiff from their employ. The declaration contained counts for salary and travelling expenses due and payable by the defendants to the plaintiff as the inspector of the agents of the defendants, and for the wrongful dismissal of the plaintiff by the defendants from his said employment, for money paid by the plaintiff for the defendants at their request, and for money due upon an account stated.

The defendants pleaded the following pleas,—1. To the first and second counts, that they did not promise as alleged,—2. To the first count, a denial that the plaintiff entered into the service,—3. To the same, a denial of the plaintiff's readiness and willingness,—4. To the same, a denial of the breach,—5. To the same, that the contract was determined by reasonable notice before breach,—6. To the same, that the employment was conditional upon the plaintiff approving himself qualified for the appointment, and that he did not so approve himself,—7. To the second count, a denial that the plaintiff entered into the service,—8. To the same, a denial of the plaintiff's readiness and willingness,—9. To the same, a denial of the breach,—10. To the same, that the employment was conditional upon the plaintiff approving himself properly qualified for the employment, and that he did not so approve himself,—11. To the last count, payment into court.

The plaintiff took and joined issue on the first ten pleas, and as to \*81] the last accepted the sum paid into court in full satisfaction and discharge of the causes of action in respect of which it had been paid in.

The plaintiff obtained an order of Keating, J., under the 50th section of the Common Law Procedure Act, 1854, for an inspection of "all documents, books, or writings in the possession or power of the defendants in relation to this action." The affidavit of the plaintiff, upon which the order was obtained, after stating the nature of the

action and of the pleadings, alleged "that the defendants have in their custody or under their control certain agenda, minute, and letter-books, and other books, which, as I verily believe, contain entries relating to my said appointment and employment by the defendants: that the said books relate to the matters in question in this cause, and it is advisable and necessary that I should inspect and be prepared to prove as part of my case on the trial of this cause the said entries in the said books: and that I believe I have a just ground to maintain this action."

*Powell, Q. C.*, moved for a rule nisi to rescind the order of *Keating, J.*—The affidavit upon which the order was made is vague in the extreme and wholly insufficient to warrant it: the deponent merely conjectures that there may be something in the defendants' books which may be useful in support of his case. According to the rule laid down by the Court of Exchequer in *Hunt v. Hewitt*, 7 Exch. 236, an application under this section (50) of the Common Law Procedure Act, 1854, will only be entertained in those cases (of which this is not one) where inspection could be obtained by filing a bill of discovery or by other proceeding in the court of equity. [*BYLES, J.*—The words of the act are, "for the purpose of discovery or otherwise."] In *Thompson v. Robson*, 2 Hurlst. & N. 412, it was held that the documents must be shown to \*exist, and it must appear that they would be evidence for the applicant. *Pollock, C. B.*, [\*82 there says: "We cannot grant a rule calling on the defendants to give a list of documents, which is a mere attempt to fish out evidence to make a case. A proper foundation must be laid for the application: the court must see that inspection is required for the purposes of justice." [*WILLIAMS, J.*—That has been very much narrowed, at least in this court: it is not necessary to show that the document would be evidence: it is enough if it may fairly be serviceable to the applicant's case. *WILLES, J.*—The affidavit relates to documents which in the ordinary course of business must exist. *BYLES, J.*—They are very much like the minutes of a railway company, which this court in *Hill v. The Great Western Railway Company*, 10 C. B. N. S. 148 (E. C. L. R. vol. 100), allowed to be inspected.] In *Woolley v. Pole*, 14 C. B. N. S. 538 (E. C. L. R. vol. 108), this court held that a mere vague suggestion that some documents exist, will not suffice: and *Erle, C. J.*, deprecates the construing the statute with too much laxity. [*ERLE, C. J.*—The order here does not seem to me to go any further than that in the case of *Hill v. The Great Western Railway Company*.] In that case it was assumed that there was a resolution which contained the terms upon which the plaintiff's services were retained. There is not a word in this affidavit to warrant such an assumption here: what the plaintiff swears is mere presumption arising from the existence of the books. No case has yet gone so far as this.(a)

*ERLE, C. J.*—I think there should be no rule in this case, although *Mr. Powell's* argument has to a considerable extent the sanction of my mind. I think it is important that there should be limits put to the \*inspection which the statute has authorized us to grant, [\*83 and that care should be taken to allow it only where it is shown

(a) See *Bull v. Clarke*, 15 C. B. N. S. 851.



that the documents sought to be inspected do really exist, and that they are relevant to the case of the party seeking the inspection. But it seems to me that the affidavit produced on this occasion is reasonably sufficient. It states that "the defendants have in their custody or under their control certain agenda, minute, and letter-books, and other books, which, as the deponent verily believes, contain entries relating to his appointment and employment by the defendants." In transacting business at Chambers, many things are necessarily assumed. This is a complaint by the servant of a corporation against the corporation for wrongfully dismissing him from their service. The directors would necessarily, in the discharge of their duty, keep books in which entries are made of the appointment of servants and generally of the disposal of the funds belonging to the corporation. These are matters which cannot be detailed in an affidavit, but which must be taken for granted. There being no affidavit in denial, my Brother Keating made the order in the words of the statute. These entries, if they exist, are admissible in evidence, and relevant to the issue. The defendants may, as my Brother Willes suggested in *Hill v. The Great Western Railway Company*, cover up all but the entries which relate to the matter in question. I think the order was properly made, and ought to stand.

WILLIAMS, J.—I entirely agree with everything my Lord has said, and especially in holding that upon this affidavit the order of my Brother Keating was properly made. Not that I think that this form of affidavit would in all cases suffice; but that, in this case, it presents such an air of probability of the \*existence of the entries  
\*84] suggested, not explained away by counter-affidavits, as to warrant the judge in acting upon it.

The rest of the court concurring,

Rule refused.

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### JOYCE v. SWANN. *May 24.*

1. There may be a complete contract so as to pass the property in goods from the seller to the buyer, although the price has not been definitively agreed on between them.

2. Where from all the facts it may fairly be inferred that it was the intention of the seller to pass the property in goods shipped to order, the mere circumstance of the bill of lading being taken in the name of the seller, and remaining unendorsed, will not prevent its passing.

3. A., who had been in the habit of buying largely of guano from B. & Co., of Liverpool, at prices which were settled at the beginning of each year, wrote to them on the 14th of February ordering a shipment of 100 tons, provided freight did not exceed 6s. 6d. On the 26th B. & Co. wrote in answer,—“We have succeeded in fixing the schooner *Anne* and *Isabella* to carry about 115 tons at your limit of 6s. 6d. per ton. We presume we may value upon you at six months from the date of shipment at 10l. per ton,” &c.; adding in a postscript,—“Please say if you purpose effecting insurance at your end.” On the 3d of March, A. wrote,—“I am favoured with yours of 26th. You say we presume we charge you 10l. per ton net cash, &c. I really cannot understand this, when I know that Mr. L. supplies your guano in Scotland at 9l. 15s. net there to dealers. Besides, I look, as heretofore, for the special allowance made to me at the origin of our transactions; and, now that you are making some changes, it may be as well that I should know how we are to get on for the future.” And he concluded with a request that some flowering shrubs should be sent to him “in charge of the captain.” On the same day, A. effected an insurance on the guano per *Anne* and *Isabella*.

The guano was shipped at Liverpool on the 4th of March, under a bill of lading making it deliverable to B. & Co. or their assigns. The bill of lading (unendorsed) was sent from Liverpool to one of the members of the firm of B. & Co. (then at Belfast) who was about to pay A.

a friendly visit at Londonderry. That gentleman arrived at A.'s house on the evening of Saturday the 7th of March, when he told A. that he had received the bill of lading and invoice of the guano and a draft for A.'s acceptance for the amount: and on the morning of the 9th they went together to A.'s office, and there the bill of lading was endorsed and handed over with the invoice to A., who thereupon accepted the bill. In the course of the same day they heard for the first time that the Anne and Isabella with the guano on board had been wrecked on the coast near Londonderry:—

Held, that the property in the guano passed to A. by the contract from the time of its shipment,—A.'s letter of the 3d of March not being a repudiation, though expressing some dissatisfaction at the price: and that A. had an insurable interest in the cargo at the time of the loss.

*Semble*, per Willes, J., that A. would have had an insurable interest, even though the property in the guano had not absolutely passed to him by the contract.

THIS was an action upon a policy of insurance. The plaintiff, who is an insurance-agent at Londonderry, had been in the habit of taking out in his own name \*at Lloyd's a policy of 10,000*l.* or other [\*85 large sum, to cover cargo by ship or ships to be from time to time declared; and as he received orders from his customers from time to time to effect insurances on goods, he has, instead of taking out a specific policy in each case, given the assured a printed memorandum stating that he (the assured) was insured by a declaration on an open policy per ship or ships dated, &c. The policy upon which the action was brought was in the following form:—

"S. G. 10,000*l.* } "In the name of God, Amen. James J. Joyce, as agent, as well in his own name as for  
"Delivered the 31st of } and in the name and names of all and every  
January, 1863. No. 185. } other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause himself and them and every of them to be insured, lost or not lost, at and from any port or ports in the north of Ireland between Killalula and Belfast, both inclusive, to any port or ports on the west coast of Great Britain between Tobermory and Holyhead, both inclusive, and or vice versâ, or from any port or place to any port or place in the north of Ireland between Killalula and Belfast, both inclusive, including all risk of craft to and from the vessel, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the [any ship or ships], whereof is master under God for this present voyage , or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship or master thereof is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, upon the said ship, &c., and shall so continue and endure during her \*abode there, upon the said ship, &c., and further until the said ship, with all her ordnance, tackle, apparel, [\*86 &c., and goods and merchandises whatsoever, shall be arrived at , upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed: and it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance: The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between

the assured and assurers in this policy are and shall be valued at 10,000*l.*, *on sundries, kelp excepted, as interest may appear, to be hereafter declared and valued; to cover property the assured may receive orders to insure:*(a) Warranted free from particular average, unless stranded, sunk, or burnt, and free from capture and seizure and the consequence of any attempt thereat: Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nature, condition, or quality soever, bartray of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof: And, in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel \*87] for, in, and about the \*defence, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to this insurance, to the charges whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured: And it is agreed by us the insurers that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street or in the Royal Exchange or elsewhere in London: and so we the assured are contented and do hereby promise and bind ourselves each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of 10*s.* per cent. In witness whereof, we the assurers have subscribed our names and sums assured, in London, this 30th January, 1863.

"N.B. Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general or the ship be stranded: Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under 5*l.* per cent.: and all other goods, also the ship and freight, are warranted free from average under 3*l.* per cent., unless general or the ship be stranded."

The defendant underwrote this policy for 400*l.* Among the interests declared by endorsement on this policy was one for 1200*l.* on the "Anne and Isabella" from Londonderry to Liverpool, "on guano so valued."

The declaration, after reciting the policy, averred, that, before the happening of the loss thereafter mentioned, certain goods covered by the said policy, to wit, guano, had been and were loaded on a certain ship, to wit, the Anne and Isabella, to be therein carried from \*88] Londonderry to Liverpool, being a voyage \*covered by the said policy, and that the plaintiff was at the time of the shipment of the said goods on board the said vessel, and of the commencement

(a) These latter words were inserted for the purpose of meeting the difficulty created by the decision of this court in *Watson v. Swann*, 11 C. B. N. S. 756 (E. C. L. R. vol. 103).

of the said risk, and thence continually until and at the time of the loss thereafter mentioned, interested in the said goods to the value and amount of all the moneys ever insured thereon, and that the said insurance was made for the use and benefit and on account of the plaintiff; that, after the commencement of the said risk, and during its continuance, and while the said policy was in full force, the said goods were by divers of the perils insured against, and not by any of the perils from which the said goods were warranted free, wholly lost,—of all which the defendant had notice; and that, before this action was brought, all conditions were fulfilled, and all warranties were complied with, and all things were done and happened, and all times elapsed, necessary to entitle the plaintiff to be paid by the defendant the sum of 400*l.* so insured by him, and interest thereon, and to sue him for the non-payment thereof thereafter mentioned; yet that the defendant had not paid the said sum of 400*l.* and interest, nor any part thereof, and the same remained wholly unpaid and in arrear, contrary to and in violation of the terms and provisions of the said policy of insurance.

There was also a count for money lent, paid, and received, for interest, and for money found due upon accounts stated.

The defendant pleaded to the first count,—that he did not become an insurer to the plaintiff as alleged,—that goods covered by the said policy had not been nor were loaded on board the said ship as alleged,—that the plaintiff was not interested in the said goods as alleged,—and that the said goods were not lost as alleged: and, to the second count, never indebted. Issue thereon.

\*The cause was tried before Erle, C. J., at the sittings in London after the last Hilary Term. The facts which appeared [\*89 in evidence were as follows:—M'Carter, a merchant in Londonderry, and a dealer in guano, had been in the habit of purchasing large quantities of that article from Messrs. Seagrave & Co., merchants in Liverpool, who are extensively engaged in the guano trade, and are in the habit of issuing circulars from time to time giving a price for their guano for the year. On the 14th of February, 1863, M'Carter wrote to Seagrave & Co. as follows:—

"Gentlemen,—I duly received yours of the 11th instant, and feel obliged by your attention. I had 12 tons of your guano on hands, and will not require any more before 1st May: but, if it serves you in any way to ship 100 tons soon, payable on the above date, you may do so, providing freight does not exceed 6*s.* 6*d.*"

To this Messrs. Seagrave & Co. replied on the 26th, as follows:—

"Dear Sir,—In accordance with your favour of 14th February, we have now the pleasure to inform you we have succeeded in fixing the schooner *Anne* and *Isabella*, of Arbroath, to carry about 115 tons, at your limit of 6*s.* 6*d.* per ton. We expect to have the cargo on board by the middle of next week. We presume we may value upon you at six months from the date of shipment, calculating it as a cash payment at the rate of 10*l.* per ton on the 1st May, *i. e.*, charging you interest from this latter date till the due time of the bill. You will have learned from the analysis the continued improvements in the intrinsic value of the phospho, which now, according to Dr. Apjohn, places it beyond comparison as the best manure, for price, in

\*90] the market: and, as you were one of our first \*customers in Ireland, we hope you will succeed in taking full advantage of the increased popularity which is sure to be caused by the more extensive use of the phospho guano this year.

"P. S. Please say if you purpose effecting insurance at your end."

On the 2d of March, M'Carter instructed the plaintiff to effect an insurance on the cargo for 1200*l.*, and the plaintiff thereupon, in pursuance of his ordinary course of business, gave him a printed memorandum filled up with the necessary particulars, of which the following is a copy:—

"Marine Insurance Agency,

"Belfast Bank, Derry, 2d March, 1863.

"Memorandum. W. M'Carter, Esq., is insured for 1200*l.* per Anne and Isabella, from Liverpool to Derry, by a declaration on an open policy per ship or ships for 10,000*l.* effected at Lloyd's, London, and dated 13th January, 1863, on guano valued at 1200*l.*, at 10*s.*

per cent. . . . . £6 0 0

"Policy duty . . . . . 0 6 0

"J. J. JOYCE, agent.

"£6 6 0

"Warranted free from capture, seizure, and detention, and all the consequences thereof or of any attempts thereat."

On the 3d of March, M'Carter replied to Messrs. Seagrave & Co.'s letter of the 26th of February, as follows:—

"Gentlemen,—I am favoured with yours of 26th. You say, we presume we charge you 10*l.* per ton net cash on 1st May, and interest on drafts from that date. I really cannot understand this, when I know that Mr. Lawson supplies your guano in Scotland at 9*l.* 15*s.*

\*91] net there to dealers. Besides, I look, as heretofore, \*for the special allowance made to me at the origin of our transactions: (a) and, now that you are making some changes, it may be as well that I should know how we are to get on for the future. I should be sorry indeed to appear unreasonable in my demands; but you will admit there is no one in this country has a prior claim on you. I thank you for the mushroom-spawn. If your Mr. George Seagrave could send me half a dozen nice flowering shrubs, including verbena, in charge of captain, I'll do as much for him."

On the 4th of March, Messrs. Seagrave & Co., having shipped the cargo, obtained from the captain a bill of lading making the guano deliverable at Londonderry "unto the order of George Seagrave & Co., or to their assigns."

On the same day, Messrs. Seagrave & Co. made out an invoice upon a printed form, as follows:—

"Liverpool, 4 March, 1863.

"Particulars of phospho guano delivered to account of W. M'Carter, Esq., Londonderry, by George Seagrave & Co., Liverpool.

"Terms, net cash.

(a) This referred to an understanding between them, under which M'Carter had been in the habit of receiving a commission of 1½ per cent. on all independent trade in the phospho guano executed by Seagrave & Co. in the county of Londonderry.

"1605 bags phos- pho guano,	}	2311. 1. 18 gross
14. 1. 9 tare		

---

2297. 0. 4 net, at 10s. per cwt. 1148. 10. 4.

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"Per Anne and Isabella, of Arbroath."

The invoice and bill of lading were not sent direct from Liverpool to M'Carter, but were forwarded from Liverpool to Mr. George Seagrave, the senior partner \*of the Liverpool house, who was [92 then at Belfast. On Saturday evening, the 7th of March, Mr. George Seagrave arrived on a friendly visit at the private residence of M'Carter near Londonderry. He then told M'Carter that the bill of lading for the guano had been sent to him by his partners, who feared from M'Carter's letter of the 3d of March that he was not satisfied. M'Carter expressed himself quite willing to take the cargo which had been shipped on his account: and an arrangement was then entered into between them in relation to future shipments, and settling the price for the year 1863. Mr. George Seagrave remained at M'Carter's house until the following Monday morning, when they walked together to M'Carter's office in Londonderry. Mr. Seagrave then endorsed the bill of lading and handed it with the invoice to M'Carter; and the latter accepted a bill of exchange for 1168*l.* 10*s.* 4*d.*, being the amount of the invoice with some interest added, and, at the request of Mr. G. Seagrave, he enclosed it in a letter addressed to Messrs. Seagrave & Co. at Liverpool, who acknowledged its receipt by a letter of the 11th of March.

Having arranged this business, Mr. Seagrave and M'Carter left the office and were proceeding through the town, when they were informed that a guano ship (which they afterwards found to be the Anne and Isabella) had been wrecked on a bank known as the Tuns, on the previous Saturday evening.

Messrs. Seagrave & Co. received M'Carter's letter of the 3d of March on the evening of the 4th; and, fearing from its tenor that the cargo might be repudiated by him, they insured it at Liverpool in their own names.

On the part of the defendant, it was submitted that there had been no complete bargain as to price between Seagrave & Co. and M'Carter, so as to pass the \*property in the guano to the latter, and consequently that, at the time of the insurance and of the loss, [93 M'Carter had no insurable interest, and that nothing that passed between Mr. George Seagrave and M'Carter after the loss had actually taken place could alter the position of the parties.(a)

For the plaintiff it was contended that there was a perfect contract by the letters of the 14th and 26th of February, and that the whole tenor of the letter of the 3d of March showed that M'Carter understood the bargain to be complete, though there was a little grumbling about the price.

In his summing up, the Lord Chief Justice told the jury, that, in general, it is essential to a bargain for the sale of goods, that the price should be agreed upon, but that, nevertheless, it was perfectly

(a) It was assumed, that, if M'Carter had an insurable interest, the loss was recoverable in this action upon the policy declared on.

competent to a vendor and vendee to be upon such confidential terms with one another as to contract for a sale of goods leaving the price to be settled thereafter; and that it was not a necessary condition to the passing of the property that the price should be definitively agreed upon. He then observed upon the correspondence, and upon the fact of the bill of lading having been sent to Mr. George Seagrave at Belfast, instead of to M'Carter direct, and also upon the fact of Messrs. Seagrave & Co. having effected an insurance upon the cargo at Liverpool: and he concluded by telling the jury, that, if the guano was appropriated to M'Carter by Seagrave & Co. when put on board the *Anne and Isabella*, with the intention of passing the property to him, they must find for the plaintiff; but that, if they intended to keep the property in their own hands and under their own control \*94] until a final arrangement \*took place as to the terms of the bargain, they must find for the defendant.

The jury returned a verdict for the plaintiff: leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that there was no evidence to go to the jury of a complete bargain between the parties so as to pass the property.

*Watkin Williams*, in Easter Term, accordingly obtained a rule to enter a nonsuit, on the ground that there was no evidence to go to the jury, or for a new trial, on the grounds,—first, that the verdict was against the weight of evidence,—secondly, that the Lord Chief Justice misdirected the jury in telling them that the property might pass though the price was not agreed upon.

*Lush*, Q. C., and *Sir George Honyman*, now showed cause.—The only question is, whether or not M'Carter had an insurable interest in the guano at the time of effecting the policy declared on. This, it is submitted, is abundantly clear from the correspondence. It is true that no precise agreement as to price is to be collected from the letters of the 14th and 26th of February: but that is not essential where the contract is executed: *Acebal v. Levy*, 4 M. & Scott 217 (E. C. L. R. vol. 80), 10 Bingh. 376 (E. C. L. R. vol. 25): and here there was abundant evidence of an appropriation of the guano to the plaintiff; and his letter of the 3d of March, especially coupled with the fact of his immediately giving orders to effect an insurance on it, clearly did not amount to a repudiation. The mere circumstance of the bill of lading not having been endorsed to the plaintiff at the time of the loss, and of its having been forwarded to Mr. George Seagrave, though fit for the consideration of the jury, is by no means conclusive to \*95] show that \*Seagrave & Co. did not mean to pass the property to M'Carter: this question was left to the jury, and they have disposed of it. In *Brown v. Hare*, 4 Hurlst. & N. 822, the defendants, merchants at Bristol, through a broker, contracted to buy of the plaintiffs, merchants at Rotterdam, ten tons of the best refined rape-oil, to be shipped "free on board" at Rotterdam in September, 1857, at 48*l.* 15*s.* per ton, to be paid for on delivery to the defendants of the bills of lading, by bill of exchange to be accepted by the defendants payable three months after date, and to be dated on the day of shipment of the oil. On the 8th of September, the plaintiffs (having on the previous day advised that the shipment would be made) shipped on board a general ship trading between Rotterdam and Bristol five

tons of the oil, and the master signed a bill of lading by which the oil was deliverable "unto shipper's order," and the plaintiffs endorsed it specially to the defendants. On the same day, the plaintiffs enclosed in a letter to the broker, the bill of lading, invoice, and bill of exchange drawn on the defendants in accordance with the contract. On the night of the 9th, the ship with the oil on board was run down in the Bristol Channel, and the oil totally lost. The plaintiffs' letter of the 8th arrived at Bristol on the afternoon of the 10th in due course of post, but after business hours. On the morning of the 11th, the broker left with the defendants the bill of lading, invoice, and bill of exchange for their acceptance. At that time he knew of the loss of the ship. In about two hours afterwards, the defendants returned to the broker the documents left with them, on the ground that, under the circumstances, they were not liable to pay for the oil. In an action for not accepting the bill of exchange, and for goods sold and delivered, the jury stated, that, in their opinion, according to mercantile usage, the risk of the \*loss of the oil was on the defend- [\*96  
ants. It was held by the Exchequer Chamber,—affirming the judgment of the Court of Exchequer,—that the property in the oil passed to the defendants when it was placed "free on board" in performance of the contract; and that it was a question for the jury whether the plaintiffs so shipped the oil in performance of their contract to place it "free on board" or for the purpose of retaining a control over it and continuing to be owners, contrary to the contract. Erle, C. J., in delivering the judgment of the court of error, says: "In this class of cases, the passing of the property may depend, according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated to the purchaser, or on the act of the vendor alone. Here, it passed by the act of the vendor alone. If the bill of lading had made the goods 'to be delivered to the order of the consignee,' the passing of the property would be clear. The bill of lading made them 'to be delivered to the order of the consignor,' and he endorsed it to the order of the consignee, and sent it to his agent for the consignee. Thus, the real question has been on the intention with which the bill of lading was taken in this form; whether the consignor shipped the goods in performance of his contract to place them 'free on board,' or for the purpose of retaining a control over them, and continuing to be owner, contrary to the contract, as in the case of *Wait v. Baker*, 2 Exch. 1, and as is explained in *Turner v. The Trustees of the Liverpool Docks*, 6 Exch. 543, and *Van Casteel v. Booker*, 2 Exch. 691. The question was one of fact, and must be taken to have been disposed of at the trial; the only question before the court below or before us being, whether the mode of taking the bill of lading necessarily prevented the property from passing. In our opinion it did not." \*[\*WILLES, J.—In that [\*97  
case, the bill of lading was sent, formally endorsed, to a common agent.] It is enough if there was a binding contract for the goods. Suppose the cargo had been destroyed by fire after the appropriation, upon whom would the loss have fallen?

*Mellish, Q. C., and Watkin Williams*, in support of the rule.—The question is,—first, whether there was any binding contract between *Seagrave & Co.*, the sellers, and *M'Carter*, the purchaser, at the time



the loss happened,—secondly, what was the nature of the contract, and whether M'Carter had an insurable interest; for, this not being the case of a sale of a specific article, it does not follow that the property passed to M'Carter because there was a binding contract. It appears that Seagrave & Co. and M'Carter had had a course of dealing in guano, the price being fixed at the beginning of each year; and that M'Carter had always been in the habit of insuring. At the time the letters of the 14th and 26th of February were written, the price for the year 1863 had not been fixed: and the price named in the letter of the 26th was not the price of the preceding year. The letter of the 3d of March was not an acceptance of the guano at the price named in the letter of the 26th of February: consequently, down to the time of the loss, the price was still left uncertain. [BYLES, J.—It manifests, however, an intention to accept the goods.] That the property in the guano did not pass by the contract itself is clear. In *Wait v. Baker*, 2 Exch. 1, the defendant, a corn-factor residing at Bristol, in December, 1846, wrote to one Lethbridge at Plymouth, requesting samples of barley, and to make him an offer of a cargo. In the same month, Lethbridge wrote to the defendant, and sent samples of barley, and offered to sell the defendant from 400 to 500 \*98] quarters f. o. b. at \*Kingsbridge or some neighbouring port, for a certain sum for cash on handing bill of lading, or by acceptance, &c. The defendant accepted the terms, subject to Lethbridge's reply. Lethbridge acceded to the defendant's proposal, and requested the defendant to give him instructions about the vessel, in order to get her correctly insured. Lethbridge sent to the defendant the charter-party (not under seal) of a vessel in which the barley was to be shipped, and which was made in Lethbridge's name. In January, 1847, the vessel was loaded with the barley, and Lethbridge received from the master the bill of lading, by which the cargo was deliverable at Bristol to the order of Lethbridge or assigns on payment of freight. Subsequently, Lethbridge called at the defendant's counting-house in Bristol, and left the invoice and unendorsed bill of lading: he afterwards called again, when a dispute arose as to the quality of the barley: the defendant, after some further dispute, tendered the amount of the cargo in money to Lethbridge, who refused to accept it, but took away the bill of lading, and endorsed it to the plaintiffs. The defendant, on the arrival of the vessel, claimed and obtained part of the cargo; but the plaintiffs, on producing the bill of lading, obtained what remained, and paid the freight. The jury found that the defendant did not refuse to accept the barley from Lethbridge; that the tender was unconditional; and that he was not an agent intrusted with the bill of lading by the defendant. In trover by the plaintiffs for the value of the barley so obtained by the defendant, it was held that no property in the cargo passed to the defendant either by the transaction at Bristol or by the shipment of the cargo on board the vessel by Lethbridge, and that therefore the plaintiffs were entitled to recover. To constitute a complete contract, the parties \*99] must be *ad idem*. It is not necessary that \*the price should be actually ascertained, but there must be some mutual understanding by which it can be ascertained: there must be a delivery and acceptance or a price ascertained. Suppose M'Carter had de-

clined to receive the cargo, could Messrs. Seagrave & Co., in declaring for goods bargained and sold or goods sold and delivered, have averred either that the one agreed to sell and the other to buy at 10*l.* per ton, or at 9*l.* 15*s.* per ton, or at a reasonable price? In the letter of the 3d of March, something is said about a usual allowance. Was there an agreement for the one party to sell without making the allowance, or for the other to buy without receiving it? If the parties had not come to a mutual and final agreement prior to the loss, the plaintiff cannot recover upon this policy. At the time the contract was actually made, viz., when the bill of exchange was accepted and the bill of lading endorsed over to M'Carter, the guano had ceased to exist: the loss had then taken place: see *Couturier v. Hastie*, 8 Exch. 40; *Hastie v. Couturier*, 9 Exch. 102; *Couturier v. Hastie*, 5 House of Lords Cases 678. No doubt, the putting the goods on board the *Anne* and *Isabella* would pass the property to M'Carter, if there was then any binding contract between him and Seagrave & Co.: but there was none. All the circumstances must be looked at to see whether or not the property passes: *Van Casteel v. Booker*, 2 Exch. 691; *Turner v. The Trustees of the Liverpool Docks*, 6 Exch. 543. The circumstances of the bill of lading making the guano deliverable to the order of Seagrave & Co. or to their assigns, and of its being transmitted to the partner and not to M'Carter direct, and of the cargo having been insured by Seagrave & Co., all strongly show that there was not any complete bargain at the time of the loss. [BYLES, J.—What was the date of Seagrave & Co.'s policy?] That did not appear: the policy was \*not put in. The question is, had [\*100 M'Carter an insurable interest in the subject of this insurance at the time of the loss. Unless the property in the guano passed to him by the mere shipment of it, he clearly had not. [WILLES, J.—In *Fragano v. Long*, 4 B. & C. 219 (E. C. L. R. vol. 10), 6 D. & R. 283, A., a resident at Naples, sent an order to M. & Co., hardwaremen at Birmingham, “to despatch to him certain goods on insurance being effected: terms, three months' credit from the time of arrival.” M. & Co. (having marked the package with A.'s initials) despatched the goods by the canal to Liverpool, and effected an insurance, declaring the interest to be in A. At Liverpool, the goods were delivered by the agent of M. & Co. to the owner of a vessel bound to Naples, through whose negligence they were damaged. And it was held that the property in the goods vested in A. as soon as they were despatched from Birmingham, and that the terms of the order did not make the arrival of the goods at Naples a condition precedent to A.'s liability to pay for them, and that he might therefore maintain an action for the injury done to the goods through the negligence of the shipowner. A party who is under covenant to repair a house, may insure it though he has ceased to have any interest in the house.] The case in reality turns upon the distinction between *Wait v. Baker*, 2 Exch. 1, and *Browne v. Hare*, 4 Hurlst. & N. 822. The jury here were evidently misled by the general proposition stated to them by the Lord Chief Justice, that the property might pass although there was no complete and definite bargain as to price.

WILLIAMS, J.—I am of opinion that this rule should be discharged. I think my Lord did not misdirect the jury in telling them that the

property in the guano might pass by the contract from the sellers to \*101] the \*purchaser although the price was not definitely agreed upon at the time. Indeed, it was not disputed, that, in the abstract, there may be a complete and binding bargain between the parties, notwithstanding the price remains to be adjusted and ascertained. As to the application of the law to the facts of the present case, I must confess my opinion is not very strong. But, upon the whole, I think there was a binding bargain, because I think there was virtually an adoption by the buyer of the price named by the sellers. It is true the correspondence does not show any express assent to the price: but, in substance, it seems to me to amount to a grumbling assent. The goods are to be sent, though the buyer protests against the justice of the terms demanded: the buyer in substance says, I will take the guano you have shipped or contracted to ship, but I trust you will not insist on the price you mention. It is however an assent, and makes a binding bargain between the parties. It was a question for the jury, and I think they were warranted in assuming that the guano was put on board pursuant to that contract, with the intention of transferring the property from the sellers to the buyer. It is true that the bill of lading was taken in the names of the sellers, and at the time the insurance was declared was unendorsed. That was a circumstance which was well worthy the attention of the jury, and might have induced them to come to a contrary conclusion. But, if they thought that, notwithstanding this, there were other circumstances sufficiently cogent to induce them to come to the conclusion that the property was intended to pass, I am of opinion that the mere circumstance of the form of the bill of lading and of the invoice being transmitted to the partner then in Ireland, instead of to M'Carter direct, was not sufficient to annihilate the other evidence in the \*102] cause, though it \*might induce the jury to pause. The cases of *Wait v. Baker*, 2 Exch. 1, and *Browne v. Hare*, 4 Hurlst. & N. 822, appear to me clearly to establish the distinction, that, if from all the facts it may fairly be inferred that the bill of lading was taken in the name of the seller in order to retain dominion over the goods, that shows that there was no intention to pass the property; but that, if the whole of the circumstances lead to the conclusion that that was not the object, the form of the bill of lading has no influence on the result. Upon the whole, I think the rule should be discharged.

WILLES, J.—I am of the same opinion. As to the alleged misdirection, I apprehend the Lord Chief Justice was quite correct in saying that the property in the guano might pass although the price was not agreed on. Of course he did not mean that the property might pass notwithstanding the contract was not complete as to price and other matters. That was not the proposition which he laid down. All that he meant, was, that, though the price was not mentioned, the law would infer from the circumstances that the price should be a reasonable price, and that the property in the goods might equally pass as if the price had been fixed in moneys numbered by the contract itself. That is perfectly good law. A contract which names no price may yet be a sufficient contract to satisfy the 17th section of the Statute of Frauds: *Hoadly v. M'Laine*, 10 Bingh. 482 (E. C. L. R. vol. 25), 4 M. & Scott 340 (E. C. L. R. vol. 30). The price not

being named, it must be assumed that the parties intended a reasonable price. That being so, the contract does in effect provide for a price: and the rest of the consequences follow. If the contract is for specific goods, the property passes by the contract: and, if it is not for specific goods, if the seller delivers them to a carrier for the buyer, the property vests by \*the delivery to the carrier,—a [\*103 proposition which is equally applicable to the delivery of goods on board a ship as to a delivery to a carrier on land. Then, as to the other grounds upon which the rule was moved. The first is, that the verdict is against the weight of evidence. The Lord Chief Justice not being dissatisfied with the verdict, that ground is disposed of. But the rule was argued on the part of the defendant's counsel as if there was no evidence at all of any interest in M'Carter. That question depends upon the construction of the letters of the 26th of February and the 3d of March. The letter of the 26th of February informs M'Carter of the shipment of a cargo not exactly in accordance with his order of the 14th, the one being for 100 tons the other for 115. That letter, therefore, must be dealt with as an offer of 115 tons, the intention being to make a complete contract. Then comes the letter of the 3d of March, in which M'Carter writes,—“I am favoured with yours of the 26th. You say we presume we charge you 10*l.* per ton, &c. I really cannot understand this, when I know that Mr. Lawson supplies your guano in Scotland at 9*l.* 15*s.* net there to dealers. Besides, I look, as heretofore, for the special allowance made to me at the origin of our transactions: and now that you are making some changes, it may be as well that I should know how we are to get on for the future.” I agree with my Brother Williams that this letter of the 3d of March is to be read as an assent, though a grumbling assent, to the letter of the 26th of February. The writer in effect says,—“I agree to accept the cargo you have shipped for me at the price named in your letter, but I shall expect the allowance.” That, I apprehend, is nothing more than a statement of usual terms, which would be imported into the contract without being mentioned. “*Expressio eorum quæ tacitè insunt nihil operatur.*” It is not proposing a new term, and so a rejection [\*104 of the offer contained in the letter of the 26th of February. The letter goes on,—“I should be sorry indeed to appear unreasonable in my demands: but you will admit there is no one in this country has a prior claim on you.” The writer then goes on to give directions about some small matters which are to be sent to him in charge of the captain; plainly showing that he was contemplating the receipt of the cargo. Taking the whole of the letter together, it amounts to this,—“I will take the guano: but the price is high; and I hope you will be induced to reconsider the matter: but at all events I will have it.” But, further, I agree, that, if Messrs. Seagrave & Co.'s letter is to be looked at as a mere offer of a price, leaving it to be settled and adjusted on a future occasion, the property in the guano would pass, though the price had not at the time been settled. The law would infer a contract at a reasonable price. I am inclined to go further; for, it appears to me, that, if what was done by Seagrave & Co. was to put the goods on board the *Anne* and *Isabella* with the intention of fulfilling M'Carter's order, even if by reason of some

special circumstances the property did not pass on shipment, yet, by reason of the risk, the buyer might insure the cargo in respect of the interest he had in it. It is like the case I put of a tenant of a house bound by a covenant to insure: though he has no longer an interest in the house, yet, by reason of his covenant, he has an interest in the insurance.

BYLES, J.—I am of the same opinion. I think there was a complete contract. The only difficulty is as to the price. I am disposed to agree with my two learned Brothers that the letter of the 3d of March \*amounted to an unwilling assent to the price named in \*105] Seagrave & Co.'s letter of the 26th of February. But, in the view I take, it is unnecessary to decide that. In order to satisfy the requirements of the 17th section of the Statute of Frauds, it is not necessary that the price should be actually agreed upon. In *Ashcroft v. Morrin*, 4 M. & G. 450 (E. C. L. R. vol. 43), an order for goods "on moderate terms" was held to be a sufficient memorandum within the statute. I think the jury were properly directed. The test put by Mr. Mellish in his argument may be adopted, and yet our decision may be the same. The vessel was chartered for M'Carter. He was informed of it. His letter of the 3d of August amounts to this,—Send the guano: but your price is high. He further directs the shrubs to be sent by the same vessel. A delivery to the carrier for M'Carter would be a delivery to M'Carter. That gets rid of all difficulty as to the construction of the correspondence. With respect to the form of the bill of lading,—in *Smith's Mercantile Law*, 5th edit. 299, the common form of the bill of lading is given, and it is said: "The bill is sometimes made out for delivery 'to ——— order or ——— assigns,' which imports an engagement to deliver to the person whom the consignor shall nominate, and his assigns, or sometimes to the *consignor* himself or his assigns. *Prima facie*, a delivery of goods on board a vessel under a bill of lading in the latter form, though it be the vessel of the intended consignee, imports an intention on the part of the consignor, especially if he be an unpaid vendor, to reserve to himself the property in the goods, and that that shall pass by the endorsement of the bill of lading. In that case, until it has been endorsed, *and accepted* by the endorsee, the goods remain his, so as to preserve his rights, whether as an unpaid vendor or \*106] otherwise: and he has a perfect right to vary their \*destination. But such a bill of lading is not conclusive, it only creates a presumption; and it will be for the jury, looking at the whole of the circumstances under which the shipment took place, to say whether the delivery was not really for and on account of the vendee, and the bill of lading was made out to the vendor on behalf of and as agent for the vendee, in which event the property will have passed and vested in the intended consignee; or whether it was not intended to preserve the rights of the unpaid vendor, until some further act was done by transferring the bill of lading." For this the editor cites *Van Casteel v. Booker*, 2 Exch. 691; *Turner v. The Trustees of the Liverpool Docks*, 6 Exch. 543; *Brown v. North*, 8 Exch. 1; and *Key v. Cotesworth*, 7 Exch. 595. In truth, the bill of lading is a two-edged weapon, because what took place subsequently, viz., the handing over of the bill of lading to M'Carter before the loss was known to

either party, throws great light upon the act of Seagrave & Co. in taking it in their own names. For these reasons, I am of opinion that there is no pretence for saying either that the jury were misdirected or that the verdict was contrary to the evidence.

ERLE, C. J., said nothing.

Rule discharged.

\*BOLCKOW and Another v. SEYMOUR and Others. [\*107  
*April 20.*

Where a contract is to be made out partly by written documents and partly by parol evidence, the whole becomes a question for the jury.

A. having entered into a contract for the supply of iron rails for Vera Cruz, applied to B. & Co., shipowners and brokers, to procure vessels to carry it thither; whereupon B. & Co. on the 19th of November wrote to A.,—"We hereby engage to find tonnage for about 5000 tons of rails to load at M. for Vera Cruz, subject to the following conditions, viz., 1000 tons to be delivered at Vera Cruz in three months from this time, and 1000 tons per month afterwards," &c. After a long correspondence and several interviews as to the class of vessels to be chartered, and the flag, B. & Co. on the 11th of December wrote to A. as follows,—"Our engagement to procure tonnage for Vera Cruz is the letter addressed to your Mr. B. on the 19th November; and, in accordance therewith, we are arranging to take up vessels for the first shipment of 1000 tons. We cannot restrict ourselves to vessels of any particular flag or class, but will of course give a preference to neutral ships of high class." On the 15th of December B. & Co. wrote to A. saying that they would prefer abandoning the contract altogether. And afterwards on the same day A. wrote,—"We accept your offer of the 19th November last, coupled with the initialled offer of the 18th. Messrs. E. hold us to our contract, and therefore we must hold you to yours, and cannot consent to your abandoning it, as intimated:—"

Held, that these letters did not constitute a complete contract, but that recourse must be had to parol evidence; and, consequently, that it was properly left to the jury to say whether or not a binding contract as alleged in the declaration was to be inferred from the whole.

THIS was an action for the alleged breach of a contract to find tonnage for the conveyance of a quantity of iron-rails from Middlesborough to Vera Cruz.

The declaration stated, that, before the making of the agreement thereafter mentioned, the plaintiffs were iron-masters at Middlesborough, and had obtained and entered into and were under a certain contract with certain persons to supply and deliver at Vera Cruz, on behalf and for the use of the French government, 5000 tons of iron-rails, on the terms, amongst others, following, that is to say, 1000 tons of the said rails to be delivered at the latest within three months from the 31st of October, 1862, 1000 tons in the course of the following month, and so on at the rate of 1000 tons a month until complete delivery; and, if the deliveries of the rails should not be effected at the times fixed as before mentioned, there would be withheld by the said French government from the contractor, as an indemnity simply for the sole act of delay, and without prejudice for damage and claims, 5 per cent. per month upon the value of the rails delayed, for the delay,—of all which premises the defendants were informed and had due notice before and at the time of the making of the agreement by them with the plaintiffs as \*thereinafter mentioned: and there- [\*108 upon, in order to enable the plaintiffs to complete their said contract and deliver the said rails at Vera Cruz aforesaid, and on the terms and at the times aforesaid, it was agreed between the plaintiffs and the defendants that the defendants would find tonnage for about

5000 tons of rails to load at Middlesborough aforesaid for Vera Cruz aforesaid, and would deliver 1000 tons of the said rails at Vera Cruz within the three months aforesaid, and 1000 tons of the said rails per month afterwards till the delivery be completed; the rails to be brought free alongside and taken free from ships; half the freight to be payable on shipment at Middlesborough-on-Tees, and the other half in London, on production of the certificate of proper delivery of the cargo at Vera Cruz: the freight to be 32s. 6d. per ton: Averment, that all things happened and all conditions were fulfilled, and all times elapsed, necessary to entitle the plaintiffs to a delivery of the said rails according to and at the place and at the times mentioned in the said agreement: Breach, that the defendants did not deliver 1000 tons of the said rails or any part thereof within the three months aforesaid, or within a reasonable time thereafter, and did not deliver 1000 tons of the said rails or any part thereof per month afterwards, nor within reasonable times thereafter; whereby the plaintiffs had lost and been deprived of the sum of 1044*l.* withheld by the French government, according to the terms thereinbefore mentioned, as an indemnity simply for the sole act of delay, and without prejudice for damage and claims, and which said sum of 1044*l.* does not exceed 5 per cent. per month on the value of the rails delayed: and that the defendants did not find tonnage for the whole of the said rails at Middlesborough, but at Sunderland; whereby the plaintiffs incurred and became liable to pay, and were \*obliged to \*109] pay, a larger sum of money for extra insurance, and in the conveyance of the said rails from Middlesborough aforesaid to Sunderland aforesaid: and that the defendants did not deliver 1000 tons per month of the said rails, but delivered in a period much less than a month, and in much shorter intervals than a month, much larger quantities of the said rails than 1000 tons, whereby the difficulties of unloading the same at Vera Cruz were greatly increased and heightened, and great extra expenses were necessarily incurred in obtaining extra labour in and about the said unloading, and also in the payment of demurrage, which the plaintiffs became liable to and had been obliged to pay: Claim, 2000*l.*

The defendants pleaded,—first, a denial of the agreement,—secondly, that they were not informed nor had they notice of the premises in the declaration in that behalf mentioned, before or at the time of the making of the alleged agreement,—thirdly, that the plaintiffs were not ready and willing to deliver the rails for shipment according to the alleged agreement,—fourthly, a denial of the several alleged breaches of agreement,—fifthly, that, before any of the alleged breaches of the agreement by the defendants, the plaintiffs absolved, exonerated, and discharged the defendants from the performance of the matters of the non-performance of which the plaintiffs complain. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after last Hilary Term. The circumstances out of which the plaintiffs' claim arose were as follows:—The plaintiffs are iron masters and coal-owners at Middlesborough-on-Tees. Messrs. Blount, of Paris, were desirous of getting a contract for the supply of 5000 tons of iron-rails for the French government, to be delivered at Vera Cruz, whence

it was proposed to make a railway for the accommodation \*of [\*110 the troops then in Mexico. The plaintiffs agreed to supply the required quantity, and to find tonnage for their conveyance to Vera Cruz at the times stipulated for in Blount & Co.'s contract with the French government; and they accordingly entered into a treaty with the defendants, shipowners and brokers in London, to find ships for that purpose, and on the 18th of November, 1862, the following memorandum was drawn up, initialled, and delivered by the defendants to the plaintiffs:—

“London, November 18th, 1862. Vera Cruz. 1000 tons to be delivered in Vera Cruz in three months from this time, and 1000 tons per month afterwards. The French government reserve the power to delay the delivery, if required, and to commence again when they think proper: also the option to send a smaller quantity than 5000 tons. Half freight payable on shipment, and other half on advice of delivery at Vera Cruz. 2s. 6d. per ton to Messrs. Bolckow & Vaughan to be added to our rate of 30s.”

On the next day the defendants wrote, and sent to the plaintiffs the following letter, which was relied upon by the latter as the contract between them:—

“London, Nov. 19th, 1862.

“We hereby engage to find tonnage for about 5000 tons of rails to load at Middlesborough-on-Tees for Vera Cruz, subject to the following conditions, viz. 1000 tons to be delivered at Vera Cruz in three months from this time, and 1000 tons per month afterwards. The government to reserve to themselves the power to delay the delivery, if required, and to commence again when they think proper; also the option to send a smaller quantity than 5000 tons. The rails to be brought free alongside, and taken free from ships. Half the freight to be payable on shipment at Middlesborough-on-Tees, and the other half in London, \*on production of the certificate of proper delivery of the cargo [\*111 at Vera Cruz. The freight to be 32s. 6d. per ton.

“SEYMOUR, PEACOCK & Co.”

No immediate reply was sent to this letter, but a correspondence and several personal communications took place between the parties as to the class of ships to be chartered, and their nationality,—only vessels of a certain class being convenient for the purpose, and American vessels being in danger of capture.

On the 10th of December, the plaintiffs wrote to the defendants, as follows:—

“The parties with whom we have contracted for the Vera Cruz rails have a low offer for the insurance of the cargoes in France, and write us the vessels must not be less than 5/8ths veritas, and that this is the definition of the classes, viz.—first-class, A. 1. black is 3/3ds veritas, A. 1. red is 5/8ths ditto,—second class, *Æ* red is only 3/4ths veritas: and wish vessels not lower in Lloyd's books than A. 1. red to be chartered. They would give a gratuity to captains of 3d. per ton, provided they would only load the register-tonnage quantity in their ships. The insurance on freight advanced to be deducted when paying the first instalment.

“BOLCKOW & VAUGHAN.”

On the 11th of December, the defendants wrote to the plaintiffs, as follows:—



"London, 11th December, 1862.

"Your favour of yesterday is duly to hand. Our *engagement* to procure tonnage for Vera Cruz is the letter addressed to your Mr. Boyd, dated 19th November; and, in accordance therewith, we are arranging to take up vessels for the first shipment of 1000 tons. We \*112] cannot restrict ourselves to vessels of any \*particular flag or class, but will of course give a preference to neutral ships of high class. We enclose form of charter.

"SEYMOUR, PEACOCK & Co."

On the same day, the plaintiffs wrote to the defendants, as follows:—

"December 11th, 1862.

"We can settle all matters in dispute in a few minutes, if your Mr. Offer will please meet Mr. Blount (from Paris) here at 5.30 P.M. to-day. Neither your letter nor charter-party are in the terms of our understanding: but, if we meet, all can be satisfactorily arranged.

"BOLCKOW & VAUGHAN."

On the 12th Mr. Boyd (on behalf of the plaintiffs) again wrote to the defendants, as follows:—

"December 12, 1862.

"Dear Sir,—I regret much you could not send me the pro formâ agreement to-day; the more particularly, as Mr. Turner had intended to leave this evening for Paris. At my solicitation, however, he has consented to stay in London over to-morrow, and is to see me then at 12 o'clock at this office, when I should be glad if you could make it convenient to call here, unless you send your ultimatum.

"JOHN BOYD."

On the 13th, Mr. Offer (one of the defendants) wrote to Mr. Boyd, as follows:—

"December 13, 1862.

"Dear Sir,—By the enclosed telegram (a) from my senior you will observe that I am unable to send you the pro formâ contract so soon as I could wish. You shall hear from me without a moment's unnecessary delay.

"GEORGE OFFER."

\*113] \*On the 15th, Mr. Seymour wrote to the plaintiffs, as follows:—

"London, 15th December, 1862.

"Re Vera Cruz contract.

"I have looked into this matter, and find from the lapse of time since we first took the business into consideration, and from the difficulties now raised, that I would prefer abandoning the contract altogether.

"GEORGE SEYMOUR."

On the same day, the plaintiffs wrote to the defendants, as follows:—

"London, 15th December, 1862.

"Re Vera Cruz contract.

"We expected for the last three days to have arranged all details with you as to this personally, which is the reason we have not replied to yours of the 11th instant sooner. Indeed, on the 12th instant, your Mr. Offer personally agreed to hand us details as soon

(a) "Do nothing with the Vera Cruz contract till we talk the matter over."

as possible: and we now wait them, *and accept your offer of the 19th November last, coupled with the initialled offer of the 18th November last.* Messrs. E. Blount & Co. hold us to our contract, and therefore we must hold you to yours, and cannot consent to your abandoning the contract, as intimated by your Mr. G. Seymour to-day. We beg you will, therefore, without further delay, give us the details promised by your Mr. Offer, and further beg to inform you that Messrs. E. Blount & Co., of Paris, have waited ever since Friday last, and still wait in London to agree with us these details, and trust you will let us have them by 3.30 p. m., when they will be again here.

"P. pro. Bolckow & Vaughan,  
"JOHN BOYD."

"P. S. We verbally accepted the contract with your Mr. Offer on Friday last, previous to the interview \*between him, Mr. [\*114 Turner, of Messrs. E. Blount & Co.'s, and the writer."

A lengthened correspondence ensued between the parties, which resulted in nothing. The consequence was, that no tonnage whatever was provided until February, 1863, and the first delivery of rails at Vera Cruz did not take place until June, and the whole were not delivered until September (instead of June); and the result was disastrous for the French army, and the government called upon Messrs. Blount & Co. to pay penalties amounting to 6000*l.*, ultimately reduced to 1044*l.*, which the plaintiffs had to recoup them. The plaintiffs also incurred 350*l.* for demurrage, 79*l.* for extra insurance, and other expenses, which they now sought to recover in this action.

On the part of the defendants it was submitted that there was no complete contract as alleged in the declaration, but a mere proposal, withdrawn before it was accepted by the plaintiffs.

For the plaintiffs it was insisted that the memorandum of the 18th of November, and the defendants' letter of the 19th, coupled with the plaintiffs' acceptance of its terms in the letter of the 15th of December, constituted a binding contract: and it was urged that the defendants' letter of the 11th of December showed what was their understanding of the matter.

In his summing-up the Lord Chief Justice intimated an opinion that the correspondence did not disclose any definite or distinct proposal on the one side and acceptance by the other: and he left it to them to say whether, taking the whole of the correspondence and the parol evidence together, there was any such contract as that declared on.

The jury returned a verdict for the defendants.

*Montague Smith*, Q. C., in Easter Term last, moved \*for a [\*115 new trial, on the grounds of misdirection, and that the verdict was against the weight of evidence. He submitted that the letters of the 19th of November and the 11th and 15th of December constituted a complete contract between the plaintiffs and the defendants, whereby the latter bound themselves to find tonnage so as to insure the delivery of the rails at Vera Cruz by the times and in the quantities mentioned in the earlier letter and the initialled memorandum of the 18th of November; and that the Lord Chief Justice ought not to have left it as he did, as a question of fact for the jury.

WILLIAMS, J.—I am of opinion that there should be no rule in this

case. If there was evidence to be submitted to the jury, and if the question was a proper one for their determination, the Lord Chief Justice not being dissatisfied with it, the verdict must stand. The only remaining question then is, whether my Lord misdirected the jury in leaving to them that which was properly a question of law to be decided by himself. The question left to the jury was, whether the parties had contracted with one another upon the terms of the document of the 19th of November, 1862. That depends upon whether all that was to be done by the judge at the trial, was, to construe a contract which appeared to have been entered into between the parties in writing, or whether, upon the evidence, it was not proper first to leave it to the jury to say whether or not any such contract had in fact been entered into,—whether that which was in writing, and read without the aid of the parol evidence, might appear to be a contract, a definite and conclusive contract, between the parties, might not be shown by such evidence to have rested in proposal and negotiation only, and was not meant to be a final agreement. Unquestionably, if \*once it is established that a document or documents \*116] represent a contract between the parties, it is not competent to the judge to ask the assistance of the jury in construing it. The real question is, whether there was or was not any contract between the parties upon the terms expressed in the document of the 19th of November, 1862. I purposely use the word “document,” as being a neutral term. Now, for the purpose of ascertaining whether or not there was a contract in writing embodying those terms, it is necessary to proceed chronologically, and take the documents in order, and to see whether any or all of them together constitute such a contract as is contended for on the part of the plaintiffs. I will first take the letter of the 19th of November. I conceive it to be unnecessary to refer to the letter of the 18th, because its terms are sufficiently set out in that of the 19th, which I take as representing the group of documents to which it refers. Now, no doubt, that is a document which upon the face of it purports to be an engagement on the part of Seymour & Co. to furnish vessels for the purpose of carrying the rails to Vera Cruz from time to time as Messrs. Bolckow & Co. were under engagement to have them delivered there. That letter does appear to be couched in language which would seem to constitute a contract, for it professes to be an engagement to supply ships so as to enable Bolckow & Co. to perform their contract. That is the strength of the plaintiffs’ case so far as that document is concerned. On the part of the defendants, many arguments of weight were urged to show that that was not intended to be a binding contract. The character of the transaction at that time would suggest to the mind of any person conversant with business that that could not have been meant to be a document which was to conclude the parties; but that all rested in contemplation and conjecture only. It \*117] \*was not then certain that the French government would consent. If they did not, and were not satisfied with the initials of Seymour, Messrs. Bolckow & Co. might be left to pay damages for breach of a contract to send the rails out, when they themselves were not certain of getting the contract which would enable them to ship them. It should seem, therefore, from the very character of the

transaction, that the proper conclusion to come to with respect to that letter of the 19th of November, would be, to hold that it amounts to this,—“ We are ready to do so and so, in the event of your being employed to get the rails forwarded to Vera Cruz.” It is quite clear that it was so dealt with,—as a mere proposal. A correspondence between the parties followed. There was much discussion as to the tonnage and as to the flag and other matters; and this discussion appears to have lasted down to the middle of December. From the character of the transaction, therefore, and from the conduct of the parties, it is clear that that letter of the 19th of November was never intended to represent a complete and final contract; but that it was merely a proposal, which was never assented to by Messrs. Bolckow & Co. That which subsequently occurred, is shown by two classes of evidence, the first of which is in writing, and the second of which consists of personal communications between the parties. With respect to the written evidence, I pass over the correspondence as to the vessels and the flag, and come to the letter of the 11th of December. That is a letter written by Seymour to Bolckow, not professing to conclude a contract which had not previously been concluded between the parties, or to be an acceptance of anything which had previously passed between them in writing or by word of mouth, but unquestionably describing the document of the 19th of November as being an engagement on the part of Messrs. Seymour & Co. \*It is [\*118 hardly necessary to say that that would not turn into a contract that which was not a contract before. In truth it was an incorrect expression. That letter, therefore, must be taken to be altogether inoperative. Then comes the letter of the 15th of December, from the plaintiffs to the defendants, which upon the face of it purports to be an acceptance of Seymour & Co.’s offer of the 19th of November, coupled with the initialled offer of the 18th. That is the way in which it must be dealt with, I apprehend, in order to show a complete contract. Many answers, however, it appears to me, may be given to the assertion that that letter is an answer to or acceptance of a proposal. In the first place, it appears upon the face of it that the proposal was not then open. It does not purport to be dealing with a proposal which had been made and adhered to by Messrs. Seymour & Co., but intimates that the plaintiffs insist upon their performing their contract of the former date, notwithstanding they informed the plaintiffs that they receded from it. Unless, therefore, the letter of the 19th of November constituted a contract, the letter of the 15th of December came too late. Then we must resort to the parol evidence of the communications between the parties. It is sufficient to say that that evidence clearly shows that down to the time the letter of the 15th of December was written, there was an open negotiation between the parties as to whether and how the proposal of Seymour & Co. to find tonnage could be acted upon. It is clear that Messrs. Bolckow & Co. had not assented to the details of the contract. That again operated as a withdrawal of the document of the 19th of November, dealt with as a proposal. Then, there is another way in which the letter of the 15th of December may be dealt with, viz. as an offer in itself: and, though there was evidence from what subsequently passed between

\*119] the parties that that offer \*was not rejected, but that it was acted upon, yet that evidence was of a description which furnished not a principle of law, but merely matter for the consideration of a jury. I speak more especially of the evidence as to Mr. Seymour's desire to see the document of the 18th of November. The jury have come to the conclusion that there never was any complete and binding contract in writing, and that there never was any contract by parol in the terms of the document of the 19th of November. That being so, it appears to me that there was no misdirection, and no ground for our interference.

BYLES, J.—I am of the same opinion. On examining the letters minutely, it seems to me that there never was any contract in writing between the parties. It is conceded that that is so, unless aid can be derived from the letters of the 11th and 15th of December. The letter of the 11th is in these terms:—"Your favour of yesterday is duly to hand. Our engagement to procure tonnage for Vera Cruz is the letter addressed to your Mr. Boyd, dated 19th November; and, in accordance therewith, we are arranging to take up vessels for the first shipment of 1000 tons." That is the statement of Seymour & Co. But that alone is not sufficient. It is necessary to resort to the letter of the 15th. That is an answer by Messrs. Bolckow & Co., not to the letter of the 11th, but to one of the 15th, in which Mr. Seymour expresses an intention to abandon the contract altogether. Messrs. Bolckow & Co. write,—“We accept your offer of the 19th November last, coupled with the initialled offer of the 18th November last. Messrs. E. Blount & Co. hold us to our contract, and therefore we must hold you to yours, and cannot consent to your abandoning the contract, as intimated by your Mr. Seymour to-day.” Neither of \*120] these letters, in my opinion, \*shows a complete contract in writing, unless it had been made complete by some prior document. But, suppose a contract in writing could be made out by reference to the whole of the correspondence, that would not conclude the question whether there was an agreement in writing as alleged in the declaration. A very pertinent case illustrative of this matter occurred very recently at the Gloucester Assizes,—a case of *Rogers v. Hadley*, 2 Hurlst. & Colt. 227. There, the plaintiff, professedly as C.'s agent, sold bark to the defendants at a price to be subsequently ascertained by C. in a manner agreed on, and induced them to sign a bought-note which described the plaintiff as the seller at an ascertained price per ton, by representing that the price was nominal, and that, as the defendants were dealing with the Crown, whose officer C. was, they would incur no risk. A day was fixed by the note on which a deposit of 20 per cent. was to be paid. The plaintiff had, in fact, himself purchased the bark from C. by a verbal contract, but had not paid for it. Afterwards, and before the deposit was paid, the plaintiff sent the defendants an invoice specifying the quantity of the bark, and debiting them as buyers from himself with a sum calculated at the price per ton in the bought and sold-notes (the real price not having been then ascertained by C.), and requesting them to pay the deposit to C., as originally arranged. The deposit was accordingly paid to C. by the defendants without objection to the basis on which it was computed. The plaintiff subsequently treated the sale as a

sale by himself as principal at the price in the bought and sold-notes. The defendants thereupon disclosed the whole transaction to C., paid C. the price, which he had then ascertained in the manner originally agreed, and took possession of the bark. It was held that parol evidence was admissible to show that the bought and sold-notes did not really contain \*the contract between the parties. The Lord Chief Baron, in giving judgment, there says:—"In the course [\*121 of the argument it was pointed out by my Brother Wilde that this is not an attempt to alter a written contract by parol evidence. There was, in fact, only one contract between the parties: but, as the exact price could not be ascertained until the account was made up, the defendants were requested by the plaintiff to sign a paper,—not as evidence of the contract between the parties, but to serve some merely apparent purpose,—probably to comply with some official requisition that such a document should be filled up. The finding of the arbitrator is express, that the object was to obtain a document, not to record a contract. There was, therefore, a real contract not in writing, and a paper prepared in order to comply with some form, which was stated at the time to contain a merely nominal price. If this were a fraud on the plaintiff's part, the authorities show that evidence of the fraud is as admissible as evidence of duress, illegality, or mistake. My Brother Bramwell during the argument put the case of the attesting-witness to an agreement signing the agreement, and the contracting party signing in the place intended for the attesting-witness, by mutual mistake. Such a mistake might undoubtedly be explained by parol evidence." That case seems to me to be very much in point. The document which is now relied upon as a contract here, was evidently originally not intended to be an absolute contract between the parties, but was probably intended to be used in procuring the contract between Blount & Co. and the French government.(a) Still the question was open whether or not \*that [\*122 was the real contract the parties entered into. That was a question of fact for the jury. They found that this was not the contract: and my Lord is not dissatisfied with the verdict. There will, therefore, be no rule.

KEATING, J.—I agree with my two learned Brothers that there ought to be no rule in this case. I think it is clear that parol evidence was admissible to show what was the real contract between the parties. That being so, the whole must necessarily be a question for the jury. It went to them; and my Lord is not dissatisfied with the result. It follows, of course, that there will be no rule.

Rule refused.

(a) The fact is,—whether it so appeared at the trial or not,—that Messrs. Blount & Co.'s contract with the French government was anterior in point of date to the document in question.

SAMUEL FITTON, Administrator of JOHN FITTON, deceased,  
v. THE ACCIDENTAL DEATH INSURANCE COMPANY.  
June 18.

By one of the conditions of a policy of insurance against accidental death or injury, it was provided that the policy insured against cuts, stabs, concussions, &c., &c., "when accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his avocations;" and then followed this exception,—“but it does not insure against death or disability arising from rheumatism, gout, *hernia*, erysipelas, or any other disease or cause arising within the system of the insured before, or at the time, or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury:”—Held, that death from *hernia* caused solely and directly by external violence, followed by a surgical operation performed for the purpose of relieving the patient, is not within the above exception.

THIS was an action on a policy of insurance against accidents.

The declaration stated that, in the lifetime of the said John Fitton, a certain policy of insurance and agreement was made and entered into between the defendants and the said John Fitton upon and for the considerations in the said policy and agreement in that behalf mentioned, and which said policy of insurance and agreement was and is in the words, letters, and figures following, that is to say,—

\*[128] \**Insurance against Death or Disablement from Accident. Accidental Death Insurance Company.*

"Class General. First payment.					"No. 44,026.
		£	s.	d.	
Premium to insure against death or entire disablement . . . . .	}	2	0	0	Renewal premium due 29th of November every year. £3 0s. 0d.
Extra premium to insure horse and machinery risk . . . . .		1	0	0	
Extra premium to insure against partial disablement . . . . .		...	...	...	
		£3	0	0	

"Incorporated pursuant to 7 & 8 Vict. c. 110, and empowered by special act of parliament, 22 Vict. c. 23.

"Chief Office, 7, Bank Buildings, Lothbury, London.

"Whereas, John Fitton, of Buxton Road, Macclesfield, in the county of Chester, commercial traveller (hereinafter called the said insured), is desirous and hath proposed to insure in manner hereinafter described with the Accidental Death Insurance Company against accidents, and hath signed a declaration bearing date the 29th day of November, 1862, setting forth, amongst other things, his profession or occupation, which declaration it is agreed shall be the basis of the contract for the insurance hereby intended to be made; and the said insured hath paid to the directors of the said company the sum of 3*l*. as the premium and consideration for the said insurance for the period of one year from the date hereof:

"Now, this policy witnesseth, that, in case the said insured shall be injured by accidental violence, and shall within three calendar months of its occurrence die from the direct effect of any such accident, the company shall be liable to pay to his executors or adminis-

trators the sum of 1000*l*. sterling three calendar months after proof has been given of such accidental death, to the satisfaction of the directors; or, in case \*such accidental violence shall wholly [\*124 disable the insured from attending to business, shall be liable to pay him a sum at the rate of 6*l*. per week during the continuance of such disability, for a period not exceeding in all six calendar months; or, in case such accidental violence shall not wholly disable the said insured, but shall partially disable him, or render him in part unable to attend to business, shall be liable to pay to him a sum not exceeding in the whole one quarter of the sum payable in respect of the whole or entire disablement: Provided always, that, in the event of any sum or sums of money being paid by the company in respect of disablement from accidental injury within the intent and meaning of this policy, by way of compensation as aforesaid or otherwise, the said policy shall after such disablement shall have ceased, or the insured shall have accepted a sum by way of compromise or compensation for the same as aforesaid, be valid for and in respect of death or disablement arising from future and other accidental injury only for the residue or balance of the whole sum hereby assured in that behalf remaining unpaid; and that the company shall not be liable to pay for disablement, being the result of two or more separate accidents, more than half the sum insured, in case of death, nor for disablement and death conjointly, by one sum or by several instalments, more than the amount insured in case of death, or in case of any previous payment as aforesaid, more than so much of such amount as may remain unpaid: Provided always, that this policy shall be in force for the period of one year from the date hereof, and thenceforth from year to year as long as the annual premiums shall be duly paid to the company as they shall become due and the directors shall agree to receive them: Provided always, that this policy shall not be assignable in any case whatsoever: Provided always, that the said insured \*shall not be entitled to claim compensation [\*125 under this policy on account of any accident which shall only in part disable him, unless he shall have paid the extra premium required to insure compensation in such cases: Provided always, that the capital stock, funds, and property of the said company (subject to the act or acts of parliament under which it is empowered, and to the deed or deeds of settlement of the said company), shall alone be answerable for claims under this policy; and no director or shareholder in the said company shall be subject to any demand in respect of such claims further than to pay to the funds of the said company the full amount of his or her shares or share for the time being in the capital of the said company remaining unpaid: Provided also, that this policy and the insurance hereby effected are and shall be subject and liable to the several conditions, restrictions, stipulations, and notice hereupon endorsed, so far as the same are or shall be applicable, in the same manner as if the same respectively were here repeated and incorporated in this policy: Provided also, that no insurance shall be effected until the premium due thereon shall have been paid, and that, if any statement or allegation contained in the aforesaid declaration, or any attempt be made to obtain compensation fraudulently or by untrue statements this policy shall be void, and



all moneys paid in respect thereof shall be forfeited to the said company. In witness whereof, the common seal of the said company is hereunto affixed, by order of the board of directors, this 29th day of November, 1862.

"Examined, R. B. PEACOCK.	"J. G. B. LAWRELL,	} Directors."
"Entered, N. SHALDERS.	"GEORGE LOWE,	
"Countersigned, EDWD. SOLLY."	"CHARLES AINSLIE,	

Averment that the conditions, restrictions, stipulations, and notice \*126] mentioned and referred to in the said \*policy and agreement, and endorsed thereupon, were and are in the words, letters, and figures following, that is to say,—

"Stipulations and conditions upon and subject to which the within policy is effected:—

"1. This policy insures against all forms of cuts, stabs, tears, bruises, concussions, crushings, gunshot-wounds, poisoned wounds, sprains, ruptured tendons, broken bones, dislocations, burns and scalds the effects of explosions and chemicals, frost-bites, bites of mad dogs, serpents, or insects, the action of lightning, suffocation by choking, drowning, hanging, when accidentally occurring, from material and external cause, where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his avocations: but it does not insure against death or disability arising from rheumatism, gout, *hernia*, erysipelas, or any other disease or cause arising within the system of the insured before or at the time or following such accidental injury (whether causing death or disability directly or jointly with such accidental injury), nor against death or disability arising from prize-fighting, duelling, the hands of justice, from intentional self-injury, whether under the influence of insanity or not, nor from injuries sustained on a railway whilst travelling otherwise than in a passenger carriage, nor whilst acting in violation of the by-laws of the railway company, nor from injuries received in the wanton and voluntary exposure of himself to obvious and unnecessary risk or injury, nor from injuries received whilst in a state of intoxication, or whilst performing any unlawful act, nor against death or disability arising accidentally from anything administered or act performed for the treatment of disease, whether surgical, medical, or otherwise, \*127] except for surgical operations performed for the treatment \*of injuries enumerated in the first part of this clause, for which compensation under this policy would be otherwise payable, nor against injury occasioned by any invasion, foreign enemy, civil commotion, popular riot, or by any military or usurped power whatsoever; and in no case against death or injury occurring beyond the period of three months from the date of injury.

"2. The renewal premium due under this policy, and extra charge, if there be any, shall be due the day when the current year for which it is first granted expires, and may be paid during ten days from that date; and, though this policy virtually terminates on the day when such current year expires, yet, whether renewed or not, it shall be held to be in force for those ten days, and any accident occurring within those ten days shall be compensated the same as if it had occurred within the current year originally insured for; but the directors shall not be bound to send any notice of the renewal pre-

mium becoming due, and shall be at liberty, should they see fit, to decline altogether to renew the policy from year to year.

"3. The company will not incur double risks of the same kind upon a single life; and any policy of insurance effected on a life already insured with the company will be absolutely void, unless specially endorsed with reference to such existing policy. This policy will also become void, should the insured, without the permission of the directors duly endorsed on the policy, ride races or steeple-chases, enter the naval, military, preventive, or police service, change his occupation, or go out of Europe, except in passing from one port in Europe to another in a decked vessel and in time of peace, or if any other similar insurance against accidents without the permission of the directors shall be hereafter effected with any other company. This \*policy will, however, not become void in consequence of the said insured becoming a member of a volunteer corps, which [\*128 will not be deemed military service, and all the peace risks of which are in this policy included in the term, horse and machinery risk.

"4. No sum payable by the company under this policy shall carry interest; and the company shall cease to be liable for such sum, if the same be not claimed within one year after it shall have become due.

"5. In case of this policy or of the moneys hereby insured to be paid becoming the subject of any trust whatsoever, the receipt of the trustee for the time being shall be an effectual discharge to the company, without the company being bound to see to the application of such moneys, or being answerable or accountable for the misapplication or non-application thereof.

"6. In the event of any accident occurring to the insured within the intent and meaning of this policy, he or his representative must give notice thereof in writing to the company at their office in London within seven days of the occurrence of the accident, stating the nature and date of the injuries, the place where, and the manner in which they were received, with the name, the then address, and the occupation of the person injured. In case the accident shall not prove fatal, but shall so seriously injure the said insured as to render him either altogether or in part unable personally to attend to or carry on any business, the insured shall within fourteen days of the accident furnish to the company a written report on the facts of the case and the injuries he has received, from his medical attendant, who shall be a duly-qualified and registered medical practitioner, and, further, shall within fourteen days after its occurrence, at the request of the company, submit himself to be examined \*by their medical officer, [\*129 either at their chief office or at the address so given by the insured as aforesaid, at his option; and, in case the disablement shall continue for longer than one month, he shall give all such further information by certificates or declarations from time to time to the company as they may reasonably require, in order to ascertain the nature and extent of such injury and disability. In case of death, the legal representative of the insured must send to the company, at their office in London, in addition to such written notice as aforesaid, a certificate from the medical attendant of the insured, stating as fully as possible the nature of the injuries and the cause of death. Com-

pliance with the above conditions shall be a condition precedent to any liability of the company in respect of such injuries.

"7. In case of this policy becoming void under any of these conditions and stipulations, or the provisions within contained, the company shall not be bound to refund any moneys which shall have been received by them in respect thereof; and all claims against the company in respect of this policy shall be extinguished.

"8. If any dispute arise respecting the amount of compensation to be paid to the insured, the matter shall be referred to arbitration in the usual way; and, in case the parties differ as to the appointment of arbitrator or umpire, or as to the terms of such reference, it shall be referred to the associate of the Court of Queen's Bench for the time being to settle the same.

"Special Notice to Insurers.

"In every case of accident, where a claim is intended to be made, notice of such accident must be sent to the chief office, 7, Bank Buildings, Lothbury, London, within seven days, in pursuance of the \*130] 6th condition: and the insurers are informed that notice \*given to any local agent will not be held by the company as a compliance with that condition.

"No renewal receipts are valid, unless they are in the printed office form, and under the signature of the manager: and no special or other endorsement will be held valid, unless the same is recognised and countersigned at the chief office.

"No compensation is payable under this policy to a person insured under the first class, on account of accidents caused by his personally riding or driving, or from accidents caused by the use, superintendence, or inspection of machinery or fire-arms of any kind, unless he has paid the extra premium required for such risk: and no compensation is payable under any class on account of accidents which may only in part disable, unless the extra premium of 2s. per cent. to cover such insurance has been paid."

The declaration then went on to aver that, after the making and entering into the said policy and agreement, and within the period of one year from the date thereof, and whilst the same was in full force and effect, and whilst the said John Fitton was insured thereby, the said John Fitton was injured by accidental violence within the true intent and meaning of the said policy and agreement, to wit, by accidentally falling with great force and violence upon and against the floor of a certain room: that the said John Fitton did within three calendar months of the occurrence of the said accident and injury, and whilst the said policy and agreement was in full force and effect, and whilst the said John Fitton was insured thereby, die from the direct effect of such accident, within the true intent and meaning of the said policy and agreement: And that all conditions necessary to be performed, and all things necessary to happen, and all times necessary to elapse, to entitle the plaintiff as such administrator \*as \*131] aforesaid to the performance in all things of the said policy and agreement by the defendants, and to entitle him to be paid the sum of 1000*l.* therein mentioned, and to maintain this action against the defendants, were performed and did happen and elapse long before the commencement of this suit, and that nothing had at any time hap-

pened to disentitle the plaintiff as such administrator as aforesaid to the performance in all things of the said policy and agreement, or to be paid the said sum, or to maintain this action: Yet the defendants had not paid the said sum of 1000*l.* or any part thereof, and the same always had been and still was wholly unpaid: Claim, 1000*l.*

The defendants pleaded that the injury and accidental violence to the said John Fitton in the declaration mentioned, was as follows, and not otherwise, that is to say, the said John Fitton accidentally fell with violence on the floor of the said room, and thereby became and was immediately ruptured in his bowels, and afflicted with strangulated hernia in his abdomen, whereupon a surgical operation was necessarily performed on the body of the said John Fitton, for the purpose of relieving him from the said strangulated hernia; and the said John Fitton afterwards, and within three calendar months of the said accident and injury, died from the said hernia, and from the said surgical operation performed as aforesaid for the treatment thereof, and the effects thereof, and not otherwise, or from any other cause.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, "that death from hernia caused solely and directly by external violence, is not within the [exception in the] first condition of the policy, so as to exempt the defendants from liability." Joinder.

\**Cocoon* (with whom was *Mellish*, Q. C.), in support of the demurrer.—To bring the case within the exception contained [\*132 in the first condition of this policy, the hernia which caused the death must have arisen from some internal cause, and not from accidental external violence. [*WILLES*, J.—It would be a most illusory policy, if it were not so.] It must be taken to apply only where the disease exists independently of the accident. Any other construction would make it a gross fraud. Erysipelas may be a constitutional infirmity. Against death from that, this policy would not insure the party: but erysipelas also frequently supervenes upon a wound or a surgical operation; and in that case the policy clearly would attach.

*J. Brown*, contra (a)—The simple question is, what is the bargain between the assured and the company. This is not like an ordinary life-policy; for, the parties insured undergo no previous examination or inquiry. The directors find by experience that accidental external violence does not produce hernia, unless there be a predisposition in the party to that sort of infirmity, and that, however caused, it constitutes a permanent and continuous injury. This is clearly stated in a book of some authority, *Drouet's Surgeon's Vade Mecum*, p. 468. It is plain that some of the general words of the first condition are applicable to hernia. [*BYLES*, J.—The plea alleges that this [\*133 injury was occasioned by a violent fall. Is not that a "concussion?" *WILLES*, J.—You must find some negative words before you can avoid the policy.] The condition in question contains a clear

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the policy did not extend to cover death from hernia and a surgical operation performed to relieve or cure the same, as shown in the plea; and that the fact of the hernia being caused by accidental violence or a fall made no difference in the case:

"2. That the facts stated in the plea bring the case within the events against which the company did not insure, as stated in the first condition set out in the declaration."

indication that the company will not be liable for death from hernia not being the direct result of and solely caused by accidental violence. [WILLIAMS, J.—It is a pity, if the company meant to rely upon that, that the plea did not allege that the death of the intestate arose from hernia occasioned by internal causes. Then, issue being taken upon it, surgeons might have been called to dispose of the question as one of medical science. Your argument leaves untouched the real question, viz. whether hernia which is the result of accidental violence is insured against by this policy.] Rheumatism, gout, hernia, erysipelas, all arise constitutionally. These were for obvious reasons intended to be excluded.

*Mellish, Q. C.*, in reply.—The plea admits that the intestate sustained an accident, and that that accident was the direct and immediate cause of the hernia of which he died. The case therefore comes distinctly within the words of the policy: and the conditions must be so read as to explain and make them consistent with and not destroy the policy. [WILLIAMS, J.—Suppose the plea went on and said that gout supervened, and that without that the intestate would not have died from the accident?] Gout is a disease which is constitutional. But hernia may arise from the direct effect of violence. When it does so, the company are clearly liable under this form of policy. Erysipelas may arise in a perfectly healthy subject from a wound or a scald. The exception does not apply to a disease of which the accident is the *causa causans*. The true construction of the exception is, \*134] \*that rheumatism and gout are always excepted, because they always arise within the system: hernia and erysipelas *when* they arise within the system. If any difficulty exists, the utmost that can be said, is, that the condition is ambiguous, and, being the language of the company, must be construed most strongly against them.

WILLIAMS, J.—I must confess I have entertained considerable doubt in the course of the argument, though the point really is a remarkably simple one. It is to my mind merely a question whether the proviso at the end of the first condition, that the company does not insure against death or disability arising from hernia, means hernia generally, whether arising from external violence or arising within the system, or whether "hernia" is governed by the other words "or any other disease or cause arising within the system of the insured before or at the time or following such accidental injury." If we decide that the company, on the true construction of the condition are liable where the death or disability arises from hernia caused by external violence, the plea is clearly a bad plea. Looking at the language of the policy, and taking the first condition all together, upon the best interpretation I can put upon it, I am of opinion that it means to exempt the company from liability only where the hernia arises within the system. As far as I can understand the subject, I think that is the fair interpretation of the language used. Hernia is not in all cases a disease arising within the system. It may or may not do so. I think the company are not relieved from responsibility where the hernia is caused by external violence. I therefore think the plaintiff is entitled to judgment.

WILLES, J.—I am of the same opinion. It is \*extremely important with reference to insurance, that there should be a [\*185 tendency rather to hold for the assured than for the company, where any ambiguity arises upon the face of the policy. No doubt this is a very valuable company: it has saved many families from severe distress. But its value would be very much diminished if it were held that the company was absolved from liability on its policies if it should appear that the immediate cause of the death of the insured was strangulated hernia arising from external violence. Hernia being very likely to arise from external violence, many persons would be deprived of the benefit of their policies if the construction contended for by the company were allowed to prevail. For the reasons given by my Brother Williams, it seems to me that the terms of this policy are large enough to include this case.

BYLES, J.—I am of the same opinion. According to the terms of the policy, the representatives of the assured were to be entitled to 1000*l.* in case the insured should be injured by accidental violence, and should within three calendar months of its occurrence die from the direct effect of any such accident. It is plain, therefore, that this case falls within the words of the policy. Then comes the first condition, which, after enumerating many forms of injury against which the policy is meant to insure, introduces an exception in these words,—“but it does not insure against death or disability arising from rheumatism, gout, *hernia*, erysipelas, or any other disease or cause arising within the system of the insured.” Now, that must be read in conjunction with what precedes it,—“This policy insures against cuts, stabs, bruises, concussions, &c., when accidentally occurring from material and external cause, where such accidental injury is the direct \*and sole cause of death to the insured, or disability to follow [\*186 his avocations.” The exception certainly goes on to say, whether, “before, or at the time, or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury,” which *hernia* may very well do. Another observation arises upon this; neither of these latter words *ex vi termini* excludes causation, and there are words which plainly would. I entirely agree with the construction which has been put upon this policy by my two learned Brothers. Death from *hernia* the result of external violence is within the first condition, and not within the exception therefrom.

*Brown* asked leave to amend pursuant to the suggestion thrown out by Williams, J., in the course of the argument.

PER CURIAM.—The defendants may have leave to amend: the amendment to be made within a week, and the costs of this argument to be plaintiff's costs in any event. Rule accordingly.

It is not always an easy question to determine exactly what is, and what is not an accident, within the meaning of a policy of insurance.

In *Schneider v. The Provident Life Insurance Co.*, 8 Am. Law Reg. 349

(1869), decided in the Supreme Court of Wisconsin, but not yet reported, the policy contained a clause, that the company should not be liable for any injury happening to the assured by reason of his “wilfully and wantonly

exposing himself to any unnecessary danger or peril"—the assured attempted to get on a train of cars while in motion, fell and was killed. It was urged on the part of the company, that inasmuch as the negligence of the deceased contributed to produce the injury, the death was not occasioned by an accident at all, within the meaning of the policy; but the court said, "Such a proposition would establish a limitation to the meaning of the word *accident* never admitted either in law or the common understanding of mankind. A very large proportion of what are universally called accidents occur through some carelessness of the party injured. An accident may happen from an unknown cause, but it is not essential that the cause should be unknown, it may be an unusual result of a known cause, and therefore unexpected, which we think was the case here, *conceding* that the negligence of the deceased was the cause of the accident."

The evidence showed that the deceased was in the regular prosecution of his business, and, finding that he would be left unless he got on while the train was in motion, made the attempt; he had doubtless seen others do it, and may have done it himself many times without injury.

The Court proceeded to say, "The provision in the policy necessarily implies that any degree of negligence falling short of *wilful and wanton exposure to unnecessary danger*, would not prevent a recovery, and we think no such negligence has been shown."

See *Sinclair v. The Maritime Passengers' Assurance Co.*, 107 Eng. Com. Law Rep. 478, where it was held that a sunstroke was an accident within the meaning of a policy granting assurance against loss of life, and personal injury arising from accidents at sea.

As to what are bodily injuries, effected through VIOLENT AND ACCI-

DENTAL MEANS, within the meaning of a policy of insurance, was very fully discussed by Judge Shipman of the United States Circuit Court, sitting as arbitrator, in the case of *Southard v. The Railway Passengers' Assurance Co.*, 34 Conn. 574: the insured in this case had made an engagement to meet some person at the depot of a railroad company, at the time of starting of a certain train, but not finding him on the cars, concluded to look for him at another depot of the company, and therefore jumped off the rear end of the train; he felt no shock, and walked briskly to where he met the person he was in search of; after a short conversation, fearing he was late, he ran back to the train and got on; sometime during his journey he felt a pain in his knee, and on reaching home and consulting a physician a partially-developed rupture was discovered on his right loin, which ultimately increased until it disabled him from business for several weeks. On a suit brought for compensation, the company denied that the injury was within the scope of their contract; on the other hand, the insured contended that the policy included all cases of bodily injury arising from causes not expressly excepted, and as this was admitted not to be within such express exceptions, he was entitled to recover.

It was held, however, that the injury did not result from an *accident* within the meaning of the contract; the judge in his opinion saying, "There was no *accident* strictly speaking in the means through which the bodily injury was effected; even calling the injury an accident, it was the result and not the means. The cause of the injury must in all cases be *violent and accidental*; the elements of force and accident must concur to bring the case within the terms of the contract.

"The degree of violence is not essential; and had the insured in jumping

from the cars fallen or struck upon some unseen object and wounded himself, the injury might have been attributed to accidental as well as violent means. But this was not the case; he alighted erect on the ground, just as he intended, and met with no obstacle; and afterwards in running, he ran from no peril or necessity, but voluntarily; and unless we call running and jumping accidents, he received no injury from violent and accidental means."

\*THE VESTRY OF ST. LEONARD'S, SHOREDITCH, v. HUGHES and Another. *June 18.* [\*187]

By a memorandum of the 19th of August, 1862, the defendants contracted to sell certain freehold premises to the plaintiffs for 2850*l.*, 285*l.* to be paid at once to the vendors' solicitor as a deposit, and the residue on the 29th of October: and it was mutually agreed that the vendors should deliver an abstract, and that the purchasers should within twenty-one days after the delivery of the abstract, deliver in writing to the vendors' solicitor their objections, if any, to, or requisitions on, the title. It then went on to provide, that "in case any objection or requisition shall be so delivered, and the vendors shall be unable or unwilling to comply therewith or remove the same, they are to be at liberty, by notice, &c., to rescind their contract and return the deposit-money, without interest or other compensation, notwithstanding any attempt made to remove or comply with such objection or requisition."

An abstract was delivered to the purchasers' solicitor on the 6th of September. On the 22d of September objections and requisitions were delivered to the vendors' solicitor. On the 4th of November (which was six days after the time mentioned in the contract for the completion thereof), the vendors' solicitor forwarded to the purchasers' solicitor replies to the requisitions on title. Nothing further was done until the 29th of November, when the plaintiffs issued a writ against *the vendors' solicitor* to recover back the 285*l.* deposited with him. The deposit was thereupon returned: and on the 11th of December the vendors gave notice to rescind the contract.

In an action brought by the purchasers on the 16th of December, to recover interest on the deposit, and their costs of investigating the title:—Held, that the vendors were not bound to exercise their option to rescind immediately on receiving the objections and requisitions, or before the day named for the completion of the contract; but that,—time not being the essence of the contract,—they might do so within a *reasonable time*, and that, under the circumstances (which the court were to deal with as a jury ought), their notice was given within a reasonable time.

THIS was an action to recover damages for the breach of a contract for the sale of certain property.

The declaration stated that theretofore, to wit, on the 19th of August, 1862, an agreement in writing was made and entered into by and between the plaintiffs and the defendants, in the words and figures following, that is to say,—“Memorandum of agreement made this 19th day of August, 1862, between W. N. Hughes, of, &c., J. L. Hughes, of, &c., and N. Hardingham, of, &c., and Elizabeth his wife, devisees in trust under the last will and testament of William Hughes, deceased, and hereinafter described as ‘the vendors,’ of the one part, and The Vestry of the Parish of St. Leonard, Shoreditch, in the county of Middlesex, and hereinafter described as ‘the purchasers,’ of the other part: The said vendors agree to sell and the said purchasers agree to purchase of them, at the sum of 2850*l.*, to be paid as follows, that is to say, the sum of 285*l.* to be \*paid into the hands of Mr. F. R. Smith, the vendors' solicitor, on the signing hereof, as a deposit and in part payment of the said purchase-money, and the residue thereof at the office of the vendors' solicitor on the 29th of October now next, All that freehold plot or piece or parcel of



land or ground fronting Old Street Road and King Street, leading out of the Old Street Road, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, which said plot or piece of land or ground, with the dimensions and abutments thereof is more particularly delineated and set forth in the plan drawn in the margin of these presents, and therein distinguished by the colours pink and red together with the several messuages or tenements, erections, and buildings now standing and being thereon, consisting of the public-house known as The King's Head, situate in King Street aforesaid, and one shop in the Old Street Road, formerly in the occupation of William Leuray, but now in the occupation of Charles Clark, as yearly tenant, at the yearly rent of 70*l.*, and who is now under notice to quit at Christmas-day next, Also a messuage and premises situate and being between the King's Head public-house aforesaid and the house and premises the corner of Old Street Road and King Street aforesaid, and known as No. 7, King Street aforesaid, in the occupation of John Damants, as yearly tenant, at the yearly rent of 17*l.*, and who is under notice to quit at Christmas-day now next, Also a messuage and premises the corner of King Street and the Old Street Road aforesaid, and five shops or sheds adjoining thereto fronting the Old Street Road aforesaid, and now in the occupation of the said John Damants and his undertenants at the yearly rent of 45*l.*, and under notice to quit on or before Michaelmas-day, 1863, together with their respective appurtenances: And it is mutually agreed between the

\*139] \*vendors and purchasers, that, subject to the stipulations herein contained, the vendors shall at their own expense prepare and deliver to the purchasers, or their solicitor, a proper abstract of title, and, subject to the said stipulations, make a good title to the premises sold, and, on payment of the balance of the purchase-money, the purchasers shall have a proper conveyance and assurance of the said premises, and the fee simple and inheritance, and as to such portion of the lands as is coloured pink in the said plan, with the buildings thereon, free from land tax, which has been redeemed; such conveyance and assurance to be prepared by and at the expense of the purchasers: And the vendors shall pay or allow all outgoings to the time of completion, and be entitled to a proportionate part of the accruing rent to that time, with the balance of the purchase-money at the time of the completion, but this stipulation is nevertheless to be without prejudice to the vendors' right reserved to resell the property as hereinafter contained: that the title to the plot of land coloured pink in the said plan, with the buildings thereon, shall commence with indentures of lease and release dated respectively the 4th and 5th days of October, 1804, and the title to the plot of land coloured red in the said plan, with the messuage thereon numbered 7, in King Street aforesaid, shall commence with indentures of lease and release dated respectively the 28th and 29th of September, 1830; and no earlier title shall in either case be required, notwithstanding any recitals in such several indentures respectively, nor shall any requisition be made in respect thereof; and no proof shall be required of any facts stated or implied in any deed, will, or other document dated more than twenty years back; that, as to such portion of the plot or piece of land

coloured pink in the said plan, with the buildings thereon, the \*vendors being devisees in trust for sale, with power to give [\*140 receipts for the purchase-money, they shall not be required to enter into any covenants other than the usual trustee covenant against encumbrances by them, and the concurrence of the parties beneficially interested shall not be required: And, inasmuch as there is no plan upon any of the title-deeds, and the plan is inserted in this agreement at the instance of the purchasers, they shall not call for any proof as to the identity or boundaries of the property other than a statutory declaration, by some person who has known the premises for more than twenty years, that the boundaries remain the same as they were when first known to the declarant, or to a similar effect, and that the public-house premises are the same as were formerly in the occupation of John Hanson the younger; that, as to any evidence of identity of property sold, and all certificates, declarations, and other evidences, attested, official, and other copies of or extracts from and searches for and production of, and attendances for inspection or otherwise in relation to, wills, deeds, documents, writings, and assurances, whether for verifying the abstract or otherwise, and that may be required by the purchasers, shall be made and obtained at the purchasers' expense; and the purchasers shall within twenty-one days after the delivery of the abstract as aforesaid deliver in writing to the vendors' solicitor their objections (if any) to or requisitions on the title, and in default, and as to all matters not therein specifically objected to, the title is to be considered as accepted: And, *in case any objections or requisitions shall be so delivered, and the vendors shall be unable or unwilling to comply therewith or remove the same, they are to be at liberty by notice in writing under the hand of their solicitor to rescind their contract and return the deposit money without interest or other compensation* [\*141 *\*notwithstanding any attempt made to remove or comply with any such objection or requisition,* and the purchasers are thereupon to return the abstract delivered; and, upon failure by the purchasers to comply with the above stipulations, their deposit-money shall at the expiration of the time limited for completion become forfeited to the vendors, who, without tendering a conveyance to the purchasers, shall be at liberty to resell the property by public or private sale; and any deficiency in the purchase-money shall be made good by the present purchasers: As witness," &c.: A verment, that the plaintiffs did all things necessary on their part to entitle them to have the required abstract of title delivered to them, and the required title made to them by the defendants; and that the time for the defendants to prepare and deliver such abstract of title, and to make such good title as agreed, had elapsed: Yet the defendants did not nor would prepare or deliver to the plaintiffs a proper abstract of title, subject to the said stipulations in that behalf contained, or make a good title to the said premises so sold, but had hitherto wholly neglected or refused so to do; by reason whereof the plaintiffs had been deprived of all the benefit and advantage which would have arisen from the completion of the said purchase, and had been put to great expenses in endeavouring to procure such title as aforesaid, and to get the said purchase completed, and had lost all gains and profits which they might and would otherwise have made and acquired from using and employing the sums of

money deposited under the said agreement and kept by the plaintiffs for the purpose of completing the said purchase. Claim, 100*l*.

The defendants pleaded,—first, that no such agreement as in the declaration mentioned was made or entered into by or between the \*142] plaintiffs and defendants \*as therein alleged,—secondly, as to so much of the declaration as related to the defendants' not preparing or delivering a proper abstract of title, subject to the stipulations in the said agreement in that behalf contained, that they did prepare and deliver to the plaintiffs a proper abstract of title subject to the stipulations aforesaid, according to their said agreement,—thirdly, as to so much of the declaration as related to the defendants' not making, subject to the said stipulations in the declaration mentioned, a good title to the said premises, that they did make a good title to the said premises as agreed,—fourthly, as to so much of the declaration as the third plea was pleaded to, that a reasonable time for the defendants to make such good title as agreed had not elapsed before action,—fifthly, as to so much of the declaration as the third plea was pleaded to, that they delivered an abstract of title in accordance with the said agreement, and that, within twenty-one days after such delivery of the said abstract of title, the plaintiffs delivered in writing to the defendants' solicitor divers objections to and requisitions on the title, and the defendants were unable and unwilling to comply therewith or remove the same, and thereupon the defendants, by notice in writing under the hand of their solicitor, rescinded the said contract, and offered to and did return the said deposit-money to the plaintiffs, and the plaintiffs then accepted the said deposit-money, and elected to and did rescind the said contract,—sixthly, that, after the making of the said agreement, and before any breach thereof, the plaintiffs exonerated and discharged the defendants from the said agreement, and from the performance of the same. Issue thereon.

Under a judge's order, the following case was stated for the opinion of the court, who were to be at liberty to draw any inference or find \*143] any facts which in their \*opinion a jury ought to have drawn or found from the facts appearing on the case:—

The agreement in the declaration set forth was made and duly executed as therein stated, and afterwards abstracts of the title of the said premises so agreed to be sold were delivered by the defendants' (the vendors') solicitor to the plaintiffs' (the purchasers') solicitor on the 6th of September, 1862.

On the 22d of September, the purchasers' solicitor sent to the vendors' solicitor requisitions on title, the only material ones of which were the following:—

"1. It is submitted that such a title is not shown by the abstracts as the vestry are according to the contract bound to accept. The contract is made by the vendors as devisees in trust under the will of William Hughes. It appears, however, from the abstract that the premises coloured red in the plan in the margin of the contract were conveyed to uses to bar dower, in favour of J. L. Hughes, one of the vendors. The vendors, as trustees, had no right to concur with Mr. J. L. Hughes in a contract for the sale at one price of their trust-estate along with his property. An objection to the title of Mr. J. L. Hughes may thus prevent the sale of their trust-property. The sale

is only justifiable in case the premises conveyed to Mr. J. L. Hughes form part of the estate of the testator William Hughes. But, in this case it should be shown that the will of William Hughes contains power to purchase real estate thereby devised, and that the purchase made by Mr. J. L. Hughes was made in pursuance of this power: and there is no such power contained in the will in question."

And as to the premises coloured red in the margin of the contract,—

"22. George James Constable, as administrator with the will annexed of John Tibbott, had no power to sell \*the premises. Decisions have, no doubt, been recently made, contrary to all [\*144 principle, authorizing *executors* to sell real estate for the payment of debts; but it is submitted that this doctrine has never been extended to *administrators*; and purchasers could not be advised to accept a title depending on such a sale."

At the end was the following note,—“The above objections and requisitions are forwarded subject to the usual searches, and to any further requisitions that may arise on the vendors’ replies thereto.”

Accompanying these requisitions was the following letter:—

“Hughes’s trustees to Shoreditch vestry.

“Herewith I beg to forward you observations and requisitions on title, substantially based on the opinion of counsel (Joshua Williams, Esq.) taken thereon. The requisitions being such as I would confidently submit will prevent the vendors enforcing contract, it will be for them to determine whether under your advice they will not prefer to resort to the rescinding clause in the contract, rather than incur further expense. As I have paid you the deposit, 285*l.*, in cash, I will thank you to return to me the check for that amount which I first gave you, the payment whereof I stopped at my bankers’. I shall not attempt to examine any of the deeds not in your possession, until I hear further from you.”

The vendors’ solicitor, without replying to such letter, on the 6th of November, 1862, forwarded to the purchasers’ solicitor replies to such requisitions on title, amongst others, as follows:—

To the 1st. “The vendors are described as devisees in trust, but are not stated to sell as devisees in trust. The vendors, having arranged with Mr. J. L. Hughes as to his premises, contracted to sell the whole, and are ready to procure the conveyance of the whole: and, if \*any question of the propriety of doing so should arise, [\*145 it will be with *cestui que trusts*, not with the purchasers.”

And to the 22d. “The testator directed the payment of the debts, and the administration with will annexed was granted to Mr. Constable as a creditor of the testator; and the fact must, therefore, have been proved to the court.”

A copy of the will of William Hughes, deceased, was appended to the case. The defendants were in fact devisees in trust for sale, with power to give receipts for the purchase-money, under the will of William Hughes, of all that portion of the plot or piece of land coloured pink in said plan, with the buildings thereon, as mentioned in the said agreement. But they were not such devisees in trust in respect of that portion of the said plot coloured red; the said John

Lockington Hughes being alone seised of that portion of the premises in his own right.

Nothing whatever occurred after the defendants' replies to the said requisitions, until afterwards, on the 29th of November, 1862, the plaintiffs issued a writ out of the Common Pleas against Mr. Smith, the stakeholder, to recover the sum of 285*l.*, the amount of deposit under the said contract, which was paid to the plaintiffs' solicitor on the 9th of December, who on receipt of the same waived his costs in the said action against Smith, but expressly stated to the person who paid the said 285*l.* that he would not waive his right to this action, and further, in answer to a request of the said clerk of Smith for a return of contract and said abstracts (such clerk at the same time holding in his hand the duplicate contract executed by the plaintiffs, with, as alleged by the defendants' solicitor, the following endorsement thereon, viz.,—"I hereby give \*notice to all whom it

\*146] may concern, that, in the exercise of the power reserved to the vendors by the said within-written contract of sale, the vendors hereby rescind the said contract and offer to return the deposit-money, and demand the return of the abstract delivered. Dated this 9th day of December, 1862,") stated to the said clerk that he would not and might not do so, as his reason for bringing the said action against Smith had been to prevent the said vendors rescinding before action brought, and to prevent any question arising therefrom. Nothing was then, viz., on the payment of the said deposit as last aforesaid, or at any other time, said by the said clerk to the said purchasers' solicitor about any notice to rescind having been endorsed on the said duplicate contract in the vendors' solicitor's possession, in the letter next hereinafter set forth referred to.

The said vendors' solicitor afterwards, on the 11th of December, 1862, wrote and sent to the said purchasers' solicitor a letter and a notice in the words and figures following:—

"11th December, 1862.

"Hughes and Shoreditch.

"Dear Sir,—In consequence of your refusing on Tuesday last to receive back the contract executed by your client, upon which I had endorsed a notice rescinding the contract between the parties, I am under the necessity of sending you a separate notice, which I do on the other side.

"F. R. SMITH."

"I hereby give notice to all whom it may concern, that, in exercise of the powers reserved to the vendors by the contract for sale, dated the 19th of August, 1862, made between William Nightingale Hughes, John Lockington Hughes, and Nathaniel Hardingham and

\*147] Elizabeth his wife, of the one part, and the vestry \*of the parish of St. Leonard, Shoreditch, of the other part, the vendors rescind the said contract, and, having returned the deposit-money, now demand the return of the abstracts delivered. Dated," &c.

To the above letter the purchasers' solicitor made no reply, but afterwards, on the 12th of December, 1862, wrote and sent to the vendors' solicitor a letter as follows:—

"12th December, 1862.

"Hughes's trustees to the Vestry of Shoreditch.

"I am requested by the vestry of Shoreditch to demand payment

of the vendors of the sum of 41*l.* 12*s.*, for interest on deposit returned, and costs of investigation of title (as per bill sent herewith); and, unless the same be paid at my office on or before Monday next, together with 5*s.*, the cost of this application, proceedings will be instituted for the recovery thereof, without further notice. I beg also to add, that I shall treat the notice of rescinding contract signed by you, and only this day received by me, as a nullity.

"JOHN MILLS."

The question for the opinion of the court was, whether, upon the above facts, the plaintiffs were entitled to recover, in respect of the breaches in the declaration, upon any, and, if any, upon which of the issues joined by the pleadings in this cause.

If the court should be of opinion that the plaintiffs were entitled to recover in this action, then judgment was to be entered for the plaintiffs for such, if any, of the items of the said bill of costs as the court might consider them entitled to recover, subject to the taxation of the said items, and such other sums as the court should think they were entitled to recover, and costs of suit, if recoverable in law. If the court should \*be of opinion that the plaintiffs were not [148 entitled to recover in this action, then judgment of nolle prosequi, with costs of defence, was to be entered for the defendants.

*Raymond* (with whom was *Keane*, Q. C.), for the plaintiffs.—The questions raised for the opinion of the court upon this special case are,—first, whether the vendors had any title to convey,—secondly, whether they had power to sell real estate for payment of debts,—thirdly, whether they were in a condition to rescind the contract after what had taken place,—and fourthly, what damages the plaintiffs are entitled to recover.

1. The statement shows that the vendors who profess to sell as devisees in trust are not so in fact. John Lockington Hughes is entitled to part of the property in his own right: the others had no power to deal with that. [WILLIAMS, J.—If the legal estate is in him, and he is willing to convey, where is the difficulty?] There is no power to apportion. If we take the estate with notice of the claims of the cestuis que trust, we may be liable to them. [Tomlinson.—The objection is, that the whole is comprised in one contract, and the purchase-money blended. That is no objection in the mouth of a purchaser.] Having notice of the trust, the purchasers would be bound to see that the vendors have power to sell. In *Dart on Vendors*, 3d edit. 390, it is said, that, "if, in dealing with an executor, the purchaser knows that all the purposes for the performance of which the law empowers him to sell have been already answered, or that he is selling for his own private benefit, the sale will be impeachable in equity: and a mortgagor or purchaser who has notice that the executor is dealing with the assets in part, but not altogether, for administration \*purposes, is bound, if the transaction come to [149 be impeached, to show how much of the money raised was in fact properly raised: so, if a trustee sell to pay his own debts, or for any other unauthorized purpose, and the purchaser have notice that such is the case." Here, the defendants should have sold the trust property by itself: they had no right to blend it with property of one of them. The will gave Lockington Hughes no authority to pur-

chase: therefore, it is clear he was acting on his own behalf, and not as devisee in trust. [BYLES, J.—You say you would be responsible for the apportionment?] Yes. [WILLIAMS, J.—It may be a mode of enabling the trustees to get a better price.]

2. An executor has no implied power to sell or mortgage land which descends to the heir charged simpliciter with the payment of debts: *Doe d. Jones v. Hughes*, 6 Exch. 223. A fortiori has not an administrator with the will annexed. In *Williams on Real Assets*, p. 82, the learned author, citing this case, says: "It might have been supposed that this decision would settle the law. This, however, was far from being the case, as will be seen by the remarks of the learned judge who had occasion to make the next decision on the subject. The next case was *Robinson v. Lowater*, 17 Beavan 592; and in this case the following remarks were made by His Honour the Master of the Rolls on the decision of *Doe d. Jones v. Hughes*,—"I have next to consider whether this case is varied by the circumstance that the devise is not a trust for the payment of debts, but merely a charge of such deficiency as the personal estate shall be insufficient to pay. The case of *Doe d. Jones v. Hughes* is relied upon to show that the executor could not make a good title to sell, and had no authority to sell vested in him. I find it difficult to reconcile the decision in that \*150] case with the numerous authorities to be found on \*this subject in Chancery; amongst which I may refer to *Ball v. Harris*, 4 Mylne & Cr. 264, where Lord Cottenham observes that a charge of debts is equivalent to a trust to sell so much as may be sufficient to pay them, *Forbes v. Peacock*, 12 Simons 541, which on this point is not affected by the reversal of the decision (1 Phillips 717), and to the case of *Gosling v. Carter*, 1 Collier C. C. 644. Before the case in the Exchequer, I had considered the law to be, that a charge of debts on an estate devised, gave the executors an implied power of sale, because, to use the expression of Sir John Leach in *Bentham v. Wiltshire*, 4 Madd. 49, the power to sell is implied from the produce being to pass through their hands in the execution of their office, as, in the payment of debts or legacies." In commenting on these dicta, the learned author, at p. 88, says: "The case of *Forbes v. Peacock* was the case of a mixed fund, and depended upon totally different principles. In *Gosling v. Carter*, all persons interested concurred in the conveyance. And the dictum of Sir J. Leach in *Bentham v. Wiltshire* seems directly opposed to the position in support of which it is cited. He says, the power to sell is implied from the produce being to pass through the hands of the executors in the execution of their office, as in the payment of debts or legacies." This is true, if the produce is by the will expressed or implied so to pass: but it merely begs the question, to say that a simple charge of debts creates such an implication. The charge charges the land only. The executor's duty is only with the personalty. The older lawyers never dreamt of any such doctrine. In *Walker v. Smalwood*, Ambler 676, a testator devised his estate charged with payment of debts, and Lord Camden, in his judgment, said that the creditors had a right to call \*151] on the heir or devisee to execute the trust. He \*says nothing about the executor; and it is obvious in what sense the word trust was here used, namely, in that of a duty to pay the creditors

out of the lands which devolved upon the heir or devisee. So, in *Hargreaves v. Michell*, 6 Madd. 326, Sir John Leach says that a charge of debts is a trust to be executed by the *devisee or heir*. So Lord Cottenham, in *Eland v. Eland*, 4 Mylne & Cr. 428, remarks, 'What evidence is it of a breach of trust that a party having such an estate subject to such a charge sells the estate as his own? He is in truth the owner subject to a charge, and it is *his duty* to satisfy the debts, which the sale may be the very means of enabling him to do.' Again, in *Johnson v. Kennett*, 6 Simons 384, 3 Mylne & K. 624, there was a charge of debts, and a devisee was also executor: but neither Lord Lyndhurst, by whom the case was decided, nor Lord Cottenham in his comments on that case (in *Eland v. Eland*), nor Lord St. Leonards, in his remarks on the same case in *Stroughill v. Anstey*, 1 De Gex, M'N. & G. 652, thought it worth while to mention the circumstance. Again, in *Walker v. Aston*, 14 Simons 87, there was a general charge of debts and legacies, and a devise in strict settlement subject to that charge. The property was ordered by the court to be sold, but no person seems to have supposed that the executor could sell, and an order was accordingly made by the court for the tenant for life to convey under the 12th section of the statute 11 G. 4 & 1 W. 4, c. 47. The case of *Robinson v. Lowater* was a peculiar one. The decision of the court below was affirmed, on appeal: 5 De Gex, M'N. & G. 272: but neither the decision itself, nor the language of the learned judge who decided it, forms any authority for the general proposition which has been sometimes deduced from it, that a charge of debts always implies a power for the executor to sell. The \*decision itself [\*152 goes no further than *Gosling v. Carter* had already gone, namely, that, where there is a charge of debts, and, subject thereto, a devise for life, with remainders over, all persons interested may convey the land so charged and devised to a purchaser, and the tenant for life may give a valid receipt for the purchase-money." In Sugden on Powers, 8th edit. 121, dealing with this subject, it is said: "The recent decisions in equity run directly counter to a contemporaneous decision at law. I allude to *Doe d. Jones v. Hughes*, where it was decided that a mere charge of debts, funeral, and testamentary expenses, on estates, whether devised to others or allowed to descend, will not give to the executors an implied power of selling or mortgaging the estates to pay the debts or the funeral or testamentary expenses; and a dictum to the contrary by Shadwell, V. C., was overruled. It was held that the estate not devised descended to the heir at law, subject to an equitable charge of the debts, funeral, and testamentary expenses. The same rule must ultimately prevail in both courts: a simple question of legal construction can only receive one solution. *The decision at law appears to establish the true rule*, and is justified and strengthened by the prevailing opinion in the profession. Upon the appeal in *Robinson v. Lowater*, one of the learned Lords Justices asked whether *Doe d. Jones v. Hughes* dealt with anything beyond the legal estate. Could it govern the case before them, which was an application to a court of equity to give effect to a charge? But the question in both cases was the same,—by whom was a legal title to be made? It was of course that the estate should be sold and



the debts paid, but by whom the sale was to be made was the point to be decided. The true distinction *as bearing upon this question*, between a mere charge and a direct trust, has not perhaps in \*all \*153] the cases been closely observed." In the present case there is a mere direction to pay debts: it is not even a charge.

3. The next question is, whether the vendors had power to rescind. The clause in the contract of sale upon which this turns, is as follows:—"And, in case any objections or requisitions shall be so delivered, and the vendors shall be unable or unwilling to comply therewith or remove the same, they are to be at liberty, by notice, to rescind their contract, and return the deposit-money, without interest or any other compensation, notwithstanding any attempt made to remove or comply with any such objection or requisition, and the purchasers are thereupon to return the abstract delivered." By the terms of the contract, the day for completion of the purchase was the 29th of October. The answers to the requisitions were not delivered until the 4th of November. That was after the breach, when the plaintiffs had a vested cause of action. And this action was commenced on the 16th of December. [WILLES, J.—The question is, whether there was any breach before action.] Under such a condition as this, the vendor's option to rescind must be exercised at once, and he is not entitled, after making numerous fruitless attempts to remove an objection, to return the deposit only, without interest and costs: *Tanner v. Smith*, 10 Simons 410; *Cutts v. Thodey*, 13 Simons 206; *Morley v. Cook*, 2 Hare 106; *Lane v. Debenham*, 17 Jurist 1005; *McCulloch v. Gregory*, 1 K. & J. 286. In the last-mentioned case, Vice-Chancellor Page Wood says: "The vendor has admitted that the difficulty cannot be overcome, and has offered to repay the deposit without interest or costs: and the only question is, whether he is entitled to resist those terms. Clark (one of the purchasers) seems to have performed his duties in strict compliance with the \*154] \*conditions of sale: one of those conditions was, that, if there were objections which the vendor could not remove, the deposit was to be paid back without interest. But a vendor cannot in such cases retain the deposit as long as he pleases, making fruitless efforts to remove the difficulty. Here, four additional abstracts were sent, and at last the purchaser was told, 'Now I give it up, and you shall have the contract rescinded, and your money paid back without interest or costs.' I think that the condition cannot be so construed. The moment the vendor knew of the defect was the time for saying 'I return your deposit without interest or costs.' Clark was always pressing for the repayment of his money, and never waived that for an instant: and I think that he is now entitled to have payment out of court of his deposit, and an account of the interest due thereon; and the costs properly incurred must be taxed."

4. Then, as to the damages,—the plaintiffs are entitled to recover the expenses they have been put to in endeavouring to get the contract carried out, and interest on the deposit. [Tomlinson.—The purchasers are not entitled to charge the vendors with the expense of copies of the abstracts. It was an improper thing to take copies at all.]

*Toblinson*, for the defendants.(a)—If necessary, the \*defendants are prepared to contend that they made out a sufficient [\*155 title. [WILLIAMS, J.—We wish you to confine your argument to the right to rescind.] Formerly, it was the practice to provide that the vendor should have a power to rescind if he would not or could not answer objections: and, if he made any attempt to answer the objections, he waived his right to rescind. There are numerous decisions to that effect. But, under this form of condition, if requisitions are made by the purchaser, he waives the time for completion, and gives the vendor a right, if his answers are not satisfactory, to rescind. [BYLES, J.—\*After the time fixed for the completion of the [\*156 contract?] Yes. The same form of condition was adopted in *Hoy v. Smythies*, 22 Beavan 510, and *Steer v. Crowley*, 14 C. B. N. S. 337 (E. C. L. R. vol. 108).

*Raymond*, in reply, referred to *Wilde v. Fort*, 4 Taunt. 384, where it was held, that, if the vendor of an estate by auction does not show a clear title by the day specified, the purchaser may recover back his deposit and rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not; and to *Stowell v. Robinson*, 3 N. C. 928 (E. C. L. R. vol. 32), 5 Scott 196, where *Wilde v. Fort* was cited and acted upon by this court. [WILLIAMS, J.—The decision in *Stowell v. Robinson* turned upon the Statute of Frauds.]

WILLIAMS, J.—I am of opinion that the defendants are entitled to judgment. In the view which we take of the case, it is unnecessary to decide the points which have been raised on the argument before us as to the requisitions and objections made on the purchasers' part on the 22d of September, because we think that the defendants are entitled to judgment on the ground set forth in the plea (fifth) relying on the condition giving the vendors power to rescind the contract.

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That it does not appear from the statement in the case that the defendants have been guilty of any breach of the agreement mentioned therein:

"2. That it appears therefrom that they delivered a good and sufficient abstract of title, and that the plaintiffs accepted and made requisitions upon the same, and that the defendants were therefore entitled to succeed upon the issue on the second plea:

"3. That the requisitions made by the plaintiffs were untenable:

"4. That the defendants sufficiently complied with the requisitions made by the plaintiffs:

"5. That it does not appear, that, at the time the defendants rescinded the contract, the time within which the defendants were bound to make out title had expired:

"6. That it appears that the defendants were entitled to and did by notice in writing rescind their contract and return the deposit, in accordance with the right conferred upon them by the said agreement to do so:

"7. That nothing had occurred to preclude their adopting that course:

"8. That it appears from the agreement that it was only as to the plot or piece of land coloured pink in the plan, with the buildings thereon, that the defendants professed to be devisees in trust for sale:

"9. That the said George James Constable, as administrator with the will annexed of John Tibbott, had power to sell the property which he professed to sell:

"10. That it does not appear that the several items in the bill of costs (a copy of which was annexed to the case) constitute expenses in endeavouring to procure title and get the purchase completed, recoverable as special damage resulting from the defendants' alleged breach of contract, within the meaning of the declaration:

"11. That the reverse appears to be the case:

"12. That the plaintiffs are not entitled to recover interest on the deposit, by way of damages, or otherwise."

It will be convenient to see the terms in which this power of rescission is conferred. They are these:—"In case any objection or requisition shall be so delivered, and the vendors shall be unable or unwilling to comply therewith or remove the same, they are to be at liberty, by notice in writing under the hand of their solicitor, to rescind the contract and return the deposit-money, without interest or other compensation, notwithstanding any attempt made to remove or comply with \*157] any such objection or \*requisition." Now, it is contended on the part of the plaintiffs, that, notwithstanding these large words, the vendors were bound to exercise the power thereby conferred upon them to rescind the contract immediately upon the sending in of the objections and requisitions. If the contract had been in the same terms as those in *Morley v. Cook*, 2 Hare 106, and *Tanner v. Smith*, 10 Simons 410, the argument might be well founded; for, those cases establish the doctrine, that, in order to entitle a vendor to avail himself of a condition such as appeared in those contracts, his election to rescind must be made as soon as he is made aware of the purchaser's objections. But the contract here has been carefully worded with a view to avoid the effect of those decisions: it is for this purpose that the parties have introduced the words,—“notwithstanding any attempt made to remove or comply with any such objection or requisition.” Under such a contract, it is clear that the vendor is not bound to make his election instant, but may do so after having taken a reasonable time to endeavour to answer or remove the objections. No time is mentioned in the contract within which the vendors are to elect: the general rule, therefore, must apply, viz. that the election must be made within a reasonable time, and that is to be implied from the nature of the agreement. Assuming that to be so, it has been urged on the part of the plaintiffs, that, at all events, the right to rescind must be limited to the time fixed for the completion of the purchase. Here, the time fixed for completion was the 29th of November, and the notice of rescission was not given until the 11th of December, which it is contended was too late. But I am of opinion that the right to rescind is not so limited. It would be a strong \*158] thing if such a limit could be imposed, seeing \*that in practice the time fixed for the completion of a purchase is almost invariably disregarded. Numerous authorities show that time in these matters (in equity) is not of the essence of the contract. By reason of the multiplicity of business, it is impossible that those who have to advise on titles should at once give their attention to requisitions and objections to answer or remove which may require much research. It may be that the requisitions and objections may be delivered the very day before that named for the completion of the bargain, and thus only a few hours would be left for their consideration. If under such circumstances it were held that the vendors are bound to exercise their option within the time named for completion, the reservation of the power to rescind would be rendered futile. I therefore think we should be deciding contrary to the plain meaning of the parties, if we held the limit suggested to be the true one. The only remaining question is, whether the vendors did declare their option to rescind within a reasonable time. I am of opinion that they did. It appears that the abstract was delivered on the 6th of September, and

that the objections and requisitions were delivered on the 22d. It certainly was contemplated that the suggestions contained in these objections and requisitions should be attended to, and that the vendors should have an opportunity of endeavouring to remove the objections, for, at the foot was the following note,—“The above observations are forwarded, subject to the usual searches, and to any further requisitions that may arise on the vendors’ replies thereto:” so that it is plain that the person who framed those objections and requisitions expected that time would be taken by the vendors’ advisers to comply with or remove them. They are no less than twenty-six in number. Many of them are of such a nature as to \*require very complicated investigations of fact; and two of [\*159] them present questions of law of no small difficulty. Moreover, they were delivered during the long vacation, when every one knows that professional assistance in these matters is not readily accessible. And, when the answers came on the 4th of November, it was not pretended that they came too late. The vendors might, therefore, reasonably suppose that the purchasers’ solicitor was considering whether the answers given were satisfactory or not. On the 29th of November, there comes a writ against the vendors’ attorney: and the matter ends by the return of the deposit-money on the 9th of December, and a formal notice on the 11th that the vendors elected to avail themselves of the condition enabling them to rescind the contract. Looking at all the circumstances, I think this option was exercised within a reasonable time, and therefore that the plaintiffs are not entitled to recover either interest or costs.

WILLES, J.—I am of the same opinion. This action appears to have been commenced on the 16th of December, 1862. The vendors elected to rescind the contract on the 11th of December, which was after the day fixed by the contract for its completion. The material dates are these,—The contract was entered into on the 19th of August, and the time named for completion was the 29th of October. One of its terms was, that the purchasers were to deliver in objections and requisitions within twenty-one days of the delivery of the abstract. The abstract was delivered on the 6th of September; and, on the 22d, the purchasers gave in certain objections and requisitions, to which answers were delivered on the 4th of November. No objection now arises to the abstract. The only question is, whether the rescission was a valid one; and that \*depends upon the true [\*160] construction of the contract of the 19th of August, one of the provisions of which was, that, “in case any objections or requisitions shall be so delivered, and the vendors shall be unable or unwilling to comply therewith or remove the same, they are to be at liberty, by notice in writing under the hand of their solicitor, to rescind the contract and return the deposit-money without interest or other compensation, notwithstanding any attempt made to remove or comply with any such objection or requisition.” No time is fixed for answering the objections: but the sellers might answer them and get rid of them if they could. The answers were in fact delivered on the 4th of November, which was after the day for the completion of the contract. If Mr. Raymond is right in saying that it was not competent to the vendors to rescind after the 29th of October, he will be entitled

to succeed. But it appears to me that there are many reasons for holding that the option reserved to the vendors to rescind is not limited to the time fixed for the completion of the contract. *Hoy v. Smythies*, 22 Beavan 510, is precisely in point to show that the effect of such a provision as this is not to limit the right to rescind to a period during which experience shows us that contracts of the sort are rarely completed. The Court of Chancery does not hold itself bound by the time for completion mentioned in the contract, unless it is clear that the parties have agreed that time shall be of the essence of the contract: and there is no conflict that I am aware of between the courts of equity and the courts of law upon this subject. Much hardship might result from a contrary decision. It might be that the requisitions and objections might be delivered on the day before or on the very day mentioned as the time for completing the contract, when it would obviously be impossible for the sellers to advise with \*161] counsel as to their validity or as to the advisability of attempting to answer or remove them. In any view, therefore, that I can regard this case, I feel compelled to come to the conclusion that the intention of the parties to the contract was, that the sellers might exercise the option to rescind within a reasonable time. The question then is, has that option been exercised here within a reasonable time? Looking at all the circumstances, the period of the year at which the objections and requisitions were delivered, and at their difficult and complicated nature, which would render a resort to the best professional assistance necessary, I think it is impossible to say that the delay in answering the objections (until the 4th of November) was an unreasonable delay. Until the 29th of November the vendors did not know that their answers to the objections and requisitions were not considered satisfactory: and it does not appear that any further expense was incurred by the purchasers after that day. The conclusion, therefore, at which I have arrived upon all the facts of the case, is, that, upon the true construction of the contract, the sellers had a reasonable time for declaring their option to rescind, and that they did declare their option to do so within a reasonable time. I therefore think the defendants are entitled to judgment.

BYLES, J.—I am of the same opinion. Mr. Raymond in his reply seemed to consider that we were about to alter the time fixed for the completion of the contract, by parol evidence. That, however, is not so. By the terms of the contract it is expressly provided, that, if the sellers are unable or unwilling to comply with or remove any requisition or objection, they are to be at liberty to rescind, notwithstanding any attempt made to remove or comply with the same. This is a sort of defeasance. No time being mentioned within which the \*162] option to rescind is to be exercised, it follows, according to the ordinary rule, that it must be done within a reasonable time. I do not think it necessary to repeat what has already been said by my Brothers Williams and Willes: it is enough to say that I agree with them. The only difficulty I have felt, has been, whether it was competent to the vendors to rescind after breach of the agreement. But the two cases of *Hoy v. Smythies*, 22 Beavan 510, and *Steer v. Crowley*, 14 C. B. N. S. 337 (E. C. L. R. vol. 108), were decided upon contracts which contained stipulations very much like

that now under consideration, and in both the contract was rescinded after the day stipulated for its performance, and in one of them,—*Steer v. Crowley*,—after an action had been brought. These cases turn the balance in my mind. I must own I should have been inclined to come to the same conclusion upon principle. These contracts are hardly ever completed within the time mentioned. If we were to put upon this contract the narrower construction for which Mr. Raymond contended, we should in truth be inserting in it words which are not to be found there, instead of construing it, as all contracts should if possible be construed, ut res magis valeat quam pereat.<sup>(a)</sup> I agree that it was competent to the sellers to rescind within a reasonable time, and that they did rescind within such reasonable time. I also think a proper abstract was delivered, and within the proper time.

KEATING, J.—I am of the same opinion. We do not propose at all to interfere with the rule adverted to by Mr. Raymond, that a written contract for the sale of land cannot be varied by parol. Our decision proceeds upon the construction of the contract: and it suffices to say that we could not give any real or practical effect [\*163 to the stipulation which provides, that, in case any objection or requisition shall be delivered which the vendors shall be unable to comply with or remove, they are to be at liberty to rescind the contract and return the deposit-money without interest or other compensation, notwithstanding any attempt made to remove or comply with any such objection or requisition, if we were to hold that time was the essence of the contract. All the cases show that time is not of the essence of a contract of this kind. The contract was rescindable and was rescinded within a reasonable time.

Judgment for the defendants.

(a) "*Benignæ faciendæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat.*"

### RUSSELL and Others v. NIEMANN. Jan. 24.

1. A bill of lading for goods shipped in a Russian port on board a Mecklenburgh ship for a port in this country, contained an exception of "the King's enemies:"—Held, that "the King's enemies" meant, or at all events included, the enemies of the sovereign of the person who made the bill of lading, viz. the Duke of Mecklenburgh, and consequently that the exception protected the captain against the consequences of a hostile seizure by the Danes, then at war with Mecklenburgh.

2. By a bill of lading the goods were made deliverable to order or assigns, "paying freight for the said goods, and all other conditions as per charter-party:"—Held, that this did not incorporate an exception in the charter-party as to "acts of enemies" and "restraints of princes."

THIS was an action by the assignees of a bill of lading against the master of the ship, for not having proceeded on the voyage according to orders, pursuant to the terms of the charter-party and bill of lading.

The declaration stated, that, after the 14th of August, 1855, certain persons, in parts beyond the seas, to wit, Messrs. Kellner & Co., at Odessa, delivered to the defendant certain goods, to wit, 3325 chetwerts fine Polish wheat in bulk, and 850 duunage mats, to be by the

defendant carried and conveyed in a certain ship of the defendants from Odessa to Cork or Falmouth for orders, and thence to one of \*164] certain ports as ordered, under a certain bill of lading signed \*for the same by the defendant, whereby the defendant agreed to carry the said goods and deliver the same at the port of destination, (the act of God, *the King's enemies*, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted), to the order of the said persons, or to their assigns, paying freight for the said goods, *and all other conditions as per charter-party* dated at Odessa, the 13/25 October, 1863, with average accustomed: Averment, that afterwards, and after the said 14th of August, 1855, the said persons endorsed the said bill of lading to the plaintiffs, in order to pass the property in such goods to the plaintiffs; and that thereupon, and by reason of such endorsement, the property in the said goods passed to the plaintiffs: that the said ship proceeded with the said goods on board to Falmouth for orders, and was there duly ordered by the plaintiffs to proceed with the cargo to Limerick, and there deliver the said cargo, the same being a port to which the said ship was bound to proceed agreeably to the terms of the said bill of lading and charter-party: that, before action brought, all conditions were fulfilled, and all things were done and happened, and all times elapsed, necessary to entitle the plaintiffs to have the terms of the said bill of lading observed by the defendant, and to sue him for the breach thereof thereafter mentioned: yet that the defendant, although not prevented by any of the excepted perils, made default in obeying the said orders and proceeding with the said cargo to Limerick in pursuance of the terms of the said bill of lading and charter-party; whereby the plaintiffs had lost the profits they would have gained if the defendant had proceeded to Limerick with the said cargo agreeably to the said orders and the terms of \*165] the said bill of lading; and the plaintiffs had also \*thereby sustained great risk of the cargo heating and deteriorating in value: Claim, 10,000*l*.

The defendant pleaded,—fifthly, that the said charter-party was in the words, letters, and figures following, that is to say, “Odessa the 13/25 October, 1863. It is this day mutually agreed between Captain H. F. Niemann, of the good ship or vessel *Vorwarts* 3/3 French veritas, of 3500 chetverts wheat, or thereabouts, under Mecklenburgh colours, now in this port discharging her cargo of coals, and Messrs. Kellner & Co., merchants and charterers of said vessel, that the said ship, being tight, staunch, and strong, and in every way fitted for the voyage, shall receive from the said merchants a full and complete cargo of tallow, wheat, seed, or other stowage goods or grain, oats excepted, all or either at the option of the charterers, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and, being so loaded, shall therewith proceed to a safe port in the united kingdom of Great Britain and Ireland, north-west coast of Ireland excepted, or on the continent between Havre and Hamburg, both inclusive, Belgium excepted, or so near thereto as she may safely get, where the ship can always lay afloat, calling at Cork or Falmouth, at the master's option, for orders (which are to be given by return of post in reply to the master's letter

to the charterers' agents in London, or lay days to commence), unless ordered direct at port of loading, and deliver the same on being paid freight as follows, &c. The freight to be paid on unloading and right delivery of the cargo, all in cash, free of interest, discount, and commission. The cargo is to be brought to and to be taken from alongside the ship at merchant's risk and expense, the captain rendering the usual assistance with his boats and crew (the act of God, enemies, fire, \*restraint of princes, and all and every dangers and accidents of the seas, rivers, and navigation, of whatever nature [\*166 or kind soever during the said voyage, always mutually excepted), &c., &c. Forty running days are to be allowed the said freighters (if the ship be not sooner despatched) for loading and unloading; and, if one-third or more of the cargo consists of wool, ten additional lay days to be allowed; to commence in each case when in every respect ready and by the local authorities permitted to load or discharge, of which notice is to be given in writing to the charterer or his agent: and, after the expiration of the said laying days, ten days on demurrage to be allowed at the rate of 7*l.* per day and payable day by day, detention by frost or quarantine not to be reckoned as lay days. Cash for ship's use at Odessa not exceeding 200*l.* to be advanced the master free of interest and commission, but subject to insurance, and to be deducted from the freight upon payment thereof. It is further agreed, that, should the whole or any part of the cargo consist of grain or seed, and any part of it be delivered in a damaged condition, the freight shall be payable on the invoice quantity taken on board as per bill of lading, or half-freight on the damaged portion, at captain's option. The charterers' liability to cease as soon as the cargo is shipped (provided it be of sufficient value to cover the freight at port of discharge); the master and owners having an absolute lien upon the cargo for all freight, dead-freight, and demurrage. The ship is to be free of commission at port of discharge. Penalty for non-performance of this agreement, half amount of freight. P. p. GEORGE KELLNER & Co. W. VAIGTS. H. F. NIEMANN." That the said bill of lading was and is in the words, letters, and figures following, that is to say,—“Shipped in good order and well conditioned, by George Kellner \* & Co., in and upon the good ship called the Vorwarts, [\*167 whereof is master for this present voyage H. F. Niemann, and now riding at anchor in the port of Odessa, bound for Cork or Falmouth for orders, 3325, three thousand three hundred and twenty-five, chetverts fine Polish wheat in bulk, and 850 mats for dunnage, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of destination (the act of God, *the King's enemies*, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted), unto order or assigns, paying freight for the said goods and *all other conditions as per charter-party* dated Odessa the 13/25 October, 1863, with average accustomed. In witness,” &c.: Averment, that the owners of the said ship and the defendant were respectively subjects of the Duke of Mecklenburgh Schwerin, and the said ship was a Mecklenburgh ship sailing under Mecklenburgh colours; and that the default complained of was caused by the act of the enemies of the said Duke of Mecklenburgh Schwerin,



being the King's enemies within the true intent and meaning of the said bill of lading.

Sixth plea,—that the said charter-party and bill of lading were respectively as in the fifth plea set out, and that the default complained of was caused by "the act of enemies" during the voyage, within the true meaning of the said charter-party.

Seventh plea,—that the said charter-party and bill of lading were respectively as in the fifth plea set out, and that the default complained of was caused by "the restraint of princes" during the voyage, within the true meaning of the said charter-party.

The defendant also demurred to the declaration, the ground of \*168] demurrer stated in the margin being "that \*it is not shown that the defendant undertook to obey the orders of the plaintiffs, and that the endorsement of the bill of lading did not pass a right of action on the charter-party." Joinder.

The second replication to the fifth plea stated that the said charter-party and bill of lading were respectively made and signed at Odessa in the empire of Russia; and that the said Messrs. George Kellner & Co. were not, nor were nor was any or either of them, a subject or subjects of the said Duke of Mecklenburgh Schwerin.

The plaintiffs demurred to the sixth and seventh pleas, the ground of demurrer stated in the margin being "that the bill of lading specifies the excepted perils, and does not incorporate the exception in the charter-party of the perils there mentioned." Joinder.

The defendant also demurred to the second replication to the fifth plea, the ground of demurrer stated in the margin being "that it is immaterial whether the said Messrs. G. Kellner & Co. or any of them were or were not subjects or a subject of the Duke of Mecklenburgh Schwerin." Joinder.

*Sir George Honyman* (with whom was *Lush*, Q. C.), for the plain- \*169] tiffs.(a)—The declaration is clearly good. \*The proper and only person to give orders as to the destination of the cargo,

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"That the declaration is good, for the following reasons,—

"1. That the bill of lading expressly states that the goods are to be carried to the port of destination, and it appears by the declaration that the port of destination was to be determined by orders at Cork or Falmouth:

"2. That the declaration shows that the ship was duly ordered by the plaintiffs at Falmouth to proceed to Limerick, and the plaintiffs, as the holders of the bill of lading, were the proper persons to give the orders:

"3. That the declaration avers general performance of all conditions precedent, and consequently, if any orders from a third party were necessary, they must be considered as having been given.

"That the fifth plea is bad, for the following reasons,—

"1. That the enemies of the Duke of Mecklenburgh are not the King's enemies within the meaning of the bill of lading, merely because the ship was sailing under Mecklenburgh colours:

"2. That the fact of one party to the contract being a Mecklenburgh subject is no ground for putting a construction upon the words 'King's enemies' other than that which *prima facie* belongs to it:

"3. That the fifth plea, if good, is sufficiently answered by the second replication, which shows that the shippers were not Mecklenburgh subjects, and that the contract was made in another country, viz., Russia.

"That the sixth and seventh pleas are bad, for the following reasons,—

"1. That the bill of lading itself specifies the perils from which the carrier is to be free; and

is, the consignee under the bill of lading. The fifth plea is bad. The cargo was neutral, on board a Mecklenburgh ship, subject to an exception of seizure by "the King's enemies." The ship was loaded in a Russian port, the cargo to be delivered in an English port. Does the mere fact of the ship being a Mecklenburgh ship, and the contract for carriage being signed by a subject of the Duke of Mecklenburgh, justify the construing the words of exception otherwise than according to their natural meaning? As to the sixth and seventh pleas, the question is, whether the general words in the bill of lading incorporate the excepted perils in the charter-party. It is submitted [\*170] that they are incorporated only so far as is not specifically provided for in the bill of lading. The exception relied on, "the acts of enemies," and "restraints of princes," merely point to things to be done by the consignee. [WILLES, J.—The common exception in the case of carriers, is, of the carrier's King's enemies. Suppose a vessel seized by an enemy of the owner of the goods, would not that be a good answer to this action? War seems to justify that which cannot be remedied. Neither of the parties to this contract are subjects of the Queen.] If the words used are to have any other than their natural meaning, it lies upon the other side to show it.

*Mellish*, Q. C. (with whom was *Hannen*), contra.(a)—The objection to the declaration is but a small matter: \*it is, that it alleges [\*171] that the ship was duly ordered by the plaintiffs to Limerick, without showing that the plaintiffs had authority so to do. [WILLES, J.—A slight amendment will cure that: add the words "having authority from the charterers so to do."] As to the fifth plea,—the exception clearly *includes* the enemies of the Duke of Mecklenburgh

the question of liability or non-liability of the shipowner is to be determined by reference to the bill of lading only:

"2. That the words contained in the bill of lading 'other conditions as per charter-party' only apply to matters not expressly provided for by the bill of lading, and consequently the exception of certain perils contained in the charter-party is not incorporated in the bill of lading."

(a) The points marked for argument on the part of the defendant were as follows:—

"That the declaration is bad, for the following amongst other reasons,—

"1. That the only orders which the defendant undertook to obey at Cork or Falmouth were, the orders of the charterers, Messrs. Kallner & Co., and not the orders of the plaintiffs or of the holder of any bill of lading:

"2. That it does not appear that the said charterers or their agents gave the defendant any orders, or that the defendant disobeyed any orders given by them:

"3. That the defendant did not by the bill of lading undertake to deliver at any port as ordered by the plaintiffs; and that, if the plaintiffs rely on the charter-party imposing on the defendant any such obligation, the declaration does not show that it contained any such stipulation:

"4. That the plaintiffs are not entitled, as assignees of the bill of lading, to sue on a contract not contained in it.

"On the argument of the demurrer to the sixth and seventh pleas respectively, the defendant will contend that the same are good, on the ground, that, if the charter-party and bill of lading are to be construed together for any purpose, they must be so for all purposes; and therefore the excepted perils mentioned in the charter-party, so far as they are not inconsistent with those in the bill of lading, must be given effect to.

"On the argument of the demurrer to the second replication to the fifth plea, the defendant will contend that the same is bad, on the ground amongst others, that it is immaterial of what country the charterers were, inasmuch as the exceptions of perils in the charter-party and bill of lading are inserted for the protection of the shipowner, and that, therefore, the exceptions of King's enemies must be read as meaning any enemies whatever, or enemies of the sovereign of the country to which the ship and owner belong."

Schwerin. Whether the Queen of England's enemies also, is immaterial. Hostility against the government of the owner of the ship must of necessity be within the exception. Generally speaking, all exceptions in a bill of lading are in favour of the master and owners. "King" has a generic sense,—all princes and rulers who hold sovereign authority. The sixth and seventh pleas are also good. The language of the bill of lading, "all other conditions as per charter-party," is amply sufficient to incorporate the whole charter-party. [WILLES, J.—Can it be necessary for a carrier to provide specially that he shall not be answerable for acts done by the shipper's own enemies? If a prize court gives up goods to hostile captors, the shipowner gets his freight. War seems to put the enemy in the place of the party himself. If the owner himself took the goods, he of course could have no action. The exception must mean the enemies \*172] of the sovereign of the carrier. It may be \*that the ship is a general ship, having goods of half a dozen nationalities on board. KEATING, J.—The enemies of the flag must be intended.]

*Sir G. Honyman*, in reply.—"The King's enemies" cannot mean the enemies of the sovereigns of both parties. Their most obvious meaning is, the enemies of the sovereign of the owner of the goods. The general words "all other conditions as per charter-party" apply only to stipulations as to lay days and demurrage, to be performed by the parties who receive the cargo under the bill of lading.(a)

WILLES, J.(b)—This was an action on a bill of lading by which the defendant contracted with Messrs. Kellner & Co. at Odessa to convey certain wheat to Europe, calling at Cork or Falmouth for orders, with the usual exception of the act of God, the King's enemies, &c. The declaration alleges that orders were given (and we must assume properly given), and disobeyed. In answer, the defendant relies upon two points,—first, he says that he was prevented from obeying those orders by the act of the enemies of his sovereign the Duke of Mecklenburgh Schwerin, being the King's enemies within the true intent and meaning of the bill of lading. The other point upon which he relies, failing the first, is, that the bill of lading related to the conveyance of goods upon a voyage in respect of which there was a charter-party, and that that charter-party is by general words of reference incorporated in the contract in the bill of lading, and so he is entitled to rely upon a larger exception which is contained in the \*173] charter-party,—"the act of God, enemies, fire, restraint of \*princes," &c. I understand, that, if Mr. Mellish has judgment upon the first point, he will be content that no judgment should be pronounced upon the second. I will therefore confine the few remarks I have to make to the first point. As to that, I agree with the argument which has been urged on behalf of the defendant, that "the King's enemies," in the bill of lading, meant the enemies of the sovereign of the owner of the vessel. In order to apply those words, we must take into consideration the circumstances under which and the place where the bill of lading was signed. It was signed at Odessa,

(a) See *Wegener v. Smith*, 15 C. B. 285 (E. C. L. R. vol. 80); *Chappel v. Comfort*, 10 C. B. N. S. 802 (E. C. L. R. vol. 100); *Cawthron v. Trickett*, 15 C. B. N. S. 754 (E. C. L. R. vol. 109).

(b) *Williams, J.*, had gone to Chambers.

which is in the empire of Russia, in favour of Messrs. Kellner & Co., who are merchants there, but as to whom we have no means of knowing whether they were Russians or Germans. The ship was a Mecklenburgh ship, and the owner a subject of the Duke of Mecklenburgh Schwerin. The persons who now sue as assignees of the bill of lading appear to be English subjects: and the destination of the vessel upon the voyage in question was a port in Great Britain. We have, therefore, to choose between three persons who may equally satisfy the word "King" in this contract, viz. the Emperor of Russia, or the Queen of England, who strictly speaking fall within the definition of Kings, and the Duke of Mecklenburgh Schwerin, who cannot in strictness be called a King, but who evidently falls within the description of the person here intended, viz. of a sovereign ruler who may make war and against whom war may be made. Taking into consideration the persons between whom and the place where the contract was made, I see no reason to suppose that the enemies of the Emperor of Russia were contemplated, merely because the contract was made in Russian territory. The destination of the cargo was England. But I cannot help thinking that it would be foreign to the intention of \*the parties to hold that therefore enemies of the Queen of England were pointed at. Then you have the fact that the [\*174 person who made the document is a subject of the Duke of Mecklenburgh. I think that makes it abundantly clear that he meant to stipulate against dangers arising from his own sovereign's enemies. The good sense and reason of the thing manifestly lead one to the conclusion that the expression "the King's enemies" at least includes the enemies of the sovereign of the person who made the contract. By reason of an act of aggression by one of those enemies, the defendant was prevented from obeying the orders given. It seems to me, therefore, that the fifth plea is a good answer, and therefore that the defendant is entitled to judgment thereon. The other question turns upon the words at the end of the bill of lading, "and all other conditions as per charter-party." If those words mean that the captain and his owner are to be bound by all the conditions contained in the charter-party as if they had been repeated in the bill of lading, then the contract is to be read as if it contained the exceptions upon which the sixth and seventh pleas are founded. But, if they mean, paying freight and performing the other conditions in the charter-party on the part of the freighters to be performed, it is not an exception varying the contract contained in the bill of lading, and those pleas would be bad. If the parties desire it, I shall be prepared to give judgment upon that to-morrow.

BYLES, J.—I am of the same opinion. The word "enemies" at least *includes* enemies of the carrier, if those are not the parties to whom it is specially directed. "King's enemies" means enemies of the sovereign of the carrier, whether that sovereign be an Emperor, a Queen, or a reigning Duke. Lest there \*should be any left [\*175 out, it is usual in charter-parties to add the words "restraints of princes and rulers." These include all cases of restraint or interruption by lawful authority; leaving the case of pirates to be ranked with other dangers of the seas, within which, according to the authority of the case of *Pickering v. Buckley*, Styles 132, it falls. There,

"Pickering brought an action of covenant upon a deed of covenants of charter-party, whereby it was covenanted that the defendant, in consideration of a certain sum of money agreed to be paid to the defendant for freight of a ship, should make such a voyage, and bear all losses and damage which should befall the ship or merchandises in her, *excepting only perils of the sea*, and declares that the defendant had not performed his agreement, and for this he brings his action. The defendant pleads, that, in the making of his voyage upon the sea, the ship was taken *per quosdam ignotos homines bellicosos*, whereby he was hindered in making of the voyage according to his agreement. To this plea the plaintiff demurs. The question was, that, in regard that in the charter-party perils of the seas were excepted, whether the taking of the ship by these unknown men of war should be accounted a peril of the sea or not, according to the meaning of merchants. Twisden, of counsel with the plaintiff, held it should not, and so the plea was not good, and that therefore the plaintiff ought to have judgment, and said this was not a danger of the sea, but a danger upon the sea: secondly, he said the party (it may be) might have prevented it by vigilancy or by making resistance, and so it may be it was his own fault the ship was taken: thirdly, the men of war that took the ship were peradventure Englishmen, and then the defendant is not to be excused, for he may have his remedy for what he is damnified against them; \*176] and cited 33 H. 6, fo. 1, and prayed judgment \*for the plaintiff. Hales (Sir Matthew Hale), of counsel for the defendant, held that to be taken and robbed by pirates is a danger of the sea, even as tempestuous winds and shelves and rocks are: and, secondly, to that it is said the pirates may be Englishmen, we are not able to say of what nation they were and therefore our plea is good in that point also, and prayed judgment for the defendant. Roll, Justice, said it was not well pleaded to say *per homines ignotos*. Bacon, Justice, said: The defendant doth not show that he and his ship was carried *per locos ignotos*, as he should have shown. But Roll, Justice, answered that it may be the ship is yet kept upon the sea, but I suppose that pirates are perils of the sea: and to this purpose a certificate of merchants was read in court, that they were so esteemed amongst merchants. Yet the court desired to have Granly, the Master of the Trinity House, and other sufficient merchants, to be brought into court to satisfy the court *vivâ voce* Friday next following. Judgment was given this term, *nil capiat per billam*, because the taking by pirates are accounted perils of the seas." The same law is laid down in 2 Roll. Abr. 248, pl. 11, and in *Barton v. Wolliford*, Comberbach 57. So that these three exceptions, the act of God, the King's enemies, and restraints of princes, seem to guard the owner against all that he need be protected from by express words.

KEATING, J.—I am of the same opinion. The exception evidently means, if I am not prevented by the acts of the enemies of my sovereign. Judgment for the defendant on the fifth plea.

Sir G. Honyman having on the following day intimated that the parties were desirous of having the judgment of the court upon the second point,

\*177] \*WILLES, J., said: We disposed of the first question in this case yesterday; and we now proceed to dispose of the second,

which is, whether the exception contained in the bill of lading is expanded by the exception in the charter-party. That depends upon whether the words "and other conditions as per charter-party," include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions ejusdem generis with that previously mentioned, viz. payment of freight,—conditions to be performed by the receiver of the goods. It is a mere question of language and construction; and we think it enough to say that the latter is the construction which we put upon these words.

As to the sixth plea,—which alleges that the default complained of was caused by the act of *enemies* during the voyage, within the true meaning of the charter-party,—that raises another question of construction. We think that "enemies" there must be read as enemies of the carrier: and consequently upon that ground our judgment should be for the defendant upon the sixth plea.

As to the seventh plea, which is founded altogether upon the charter-party, that is to say, upon the substance of the charter-party, the exception of "restraint of princes," which is relied on to justify the refusal to proceed to the port ordered,—that exception is not to be found in the bill of lading, and therefore we give judgment for the plaintiffs on the seventh plea.

Upon the whole, perhaps the more convenient course will be, to give judgment for the defendant on the fifth plea, and for the plaintiffs on the other two.

Judgment accordingly.

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\*LITTEN *v.* DALTON. May 30. [\*178

The discharge of an insolvent debtor under the 1 & 2 Vict. c. 110, s. 75, is no release of a debt created by the payment of a surety, after the discharge, of a bill the consideration for which was inserted in the schedule as a debt for money lent due to the payee.

THIS was an action upon a bill of exchange for 30*l.*, drawn by the plaintiff on the 12th of November, 1860, upon and accepted by the defendant, payable three months after date; with a count for money lent, money paid, and money found due upon accounts stated.

The defendant pleaded to the first count,—first, that he did not accept the bill as alleged,—secondly, that the plaintiff was not at the commencement of the suit the holder of the bill,—thirdly, that, before the acceptance of the said bill, and after the act of parliament passed, &c. (1 & 2 Vict. c. 110), commenced and came into operation, and while it was in force, the defendant, being a prisoner in actual custody within the walls of a prison in England upon process for debt, duly petitioned the court for the relief of insolvent debtors in England for his discharge from such custody according to the provisions of the said act; and thereupon, afterwards, and before the discharge of the defendant pursuant to the said act, and whilst the said petition was pending, the defendant, in order to induce one Healey, who then claimed to be a creditor of the defendant, and as such entitled to oppose his discharge under the said act, to cease from opposing and not thereafter to oppose the discharge of the defendant pursuant to the said petition and the said act of parliament, as he had threatened

to do, and in consideration that he would not thereafter oppose such discharge as aforesaid, and for no other consideration whatsoever, illegally and contrary to the form and effect of the statute in such case made, at the request of the plaintiff accepted the said bill for the \*179] purpose and \*upon the terms and for the consideration aforesaid; and, except as aforesaid, there never was any value or consideration for the acceptance or payment by the defendant of the amount of the said bill, or for the plaintiff holding the same; and the plaintiff held and still holds the said bill without any value or consideration; and the plaintiff became the maker and holder of the said bill with full knowledge of the premises,—fourthly, that the defendant was duly discharged according to the act of parliament made in the second year of Her Majesty's reign, &c., in that behalf, of and from a certain debt then due from the defendant, and that the said bill of exchange was a new security given by the defendant to the plaintiff for the payment of the said debt, and without other value or consideration, and that such order remains in force,—fifthly, never indebted, to the money counts. Issue thereon.

The cause was tried before Williams, J., at the second sitting at Westminster in Easter Term last. It appeared, that, early in the year 1860, the plaintiff drew a bill upon the defendant for 30*l*. for the accommodation of the latter, and to enable him to obtain a loan from one Healey. This bill was endorsed by the plaintiff and handed to Healey, but was not paid at maturity. A renewed bill similarly drawn and accepted was in like manner dishonoured. In September, 1860, the defendant petitioned for his discharge under the insolvent debtors act, and, in order to induce Healey to forbear from opposing his discharge, the defendant consented to accept the bill declared on, drawn by the plaintiff, as before. No notice was taken of either bill in the defendant's schedule, nor did the plaintiff's name appear therein: but Healey was inserted as a creditor thus,—“No. 5, Healey, butcher, London Street, Tottenham Court Road. Admitted. 30*l*. for \*180] money \*lent.” The defendant obtained his discharge on the 12th of December. And in April, 1861, the plaintiff was called upon by Healey and paid the bill, by allowing it in account between them.

Under the direction of the learned judge, a verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him on the fourth plea if the court should be of opinion that the evidence sustained it.

*John Lloyd*, in Easter Term last, obtained a rule nisi accordingly.—He referred to the 91st section of the 1 & 2 Vict. c. 110, and to the case of *Goldsmid v. Hampton*, 5 C. B. N. S. 94 (E. C. L. R. vol. 94).

*Woollett* and *Baylis* now showed cause.—An insolvent's discharge is no bar to the action of a surety who after such discharge is called upon to pay, and does pay, a debt due before the discharge,—even though the plaintiff be surety upon a bill which is inserted in the insolvent's schedule. This was distinctly decided by this court in *Powell v. Eason*, 8 Bingh. 23 (E. C. L. R. vol. 21), 1 M. & Scott 68 (E. C. L. R. vol. 28). Tindal, C. J., there says: “We are to take the description of the debts from which the insolvent is to be discharged, from the 10th and 46th sections of the act (7 G. 4, c. 57). The 10th

section, which authorizes the insolvent's petition, describes them as 'the demands of all persons who shall claim to be creditors of such prisoner at the time of presenting such petition.' And s. 46 authorizes his discharge from custody 'as to the several debts and sums of money due or claimed to be due at the time of filing such prisoner's petition. Then, was the plaintiff a creditor of the defendant at the time of presenting his petition? There was no debt as between him and the defendant: the debt was due from the defendant to Bell: the \*plaintiff was no more than a surety, and consequently no [\*181 creditor at the time of the discharge. As a confirmation of this view of the subject, we find, that, in an act passed the year before,—the Bankrupt Act, 6 G. 4, c. 16,—a machinery is employed to relieve the bankrupt from the claim of a surety, for he may pay the debt, and stand in the place of the original creditor. There is no such clause in the present act; from which we may infer that the legislature intended to discharge a bankrupt from such claims, but not an insolvent." [WILLES, J.—In *Boydell v. Champneys*, 2 M. & W. 433, it was held that an insolvent debtor who inserts in his schedule the name of the holder of a bill of exchange on which he is liable, or gives such other description of it as satisfies the statute (7 G. 4, c. 57, s. 46), is discharged as to all the parties to the bill (although they are not named in the schedule), and also as to the original debt for which it was a security.] The bill was not inserted in the defendant's schedule at all. [WILLES, J.—Is not this matter in effect decided by *Leonard v. Baker*, 15 M. & W. 202? It was there held, that, under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, s. 75, the prisoner is discharged only as to the particular debts and sums of money mentioned in his schedule to be due from him to his creditors named therein, and not generally as to all his debts then due to such creditors.] *Finney v. Lord Brownlow Cecil*, 1 C. B. N. S. 117 (E. C. L. R. vol. 87), shows that reasonable accuracy of description must be used. To a declaration by an endorsee of a *promissory note* for 1000*l.* made by the defendant, payable to one *John Lee Jackson*, the defendant pleaded his discharge under the 1 & 2 Vict. c. 110. The entry in the defendant's schedule by which it was sought to support this plea, was,—"*James Lee Jackson, of, &c., 1000*l.*, the amount of my bond given by me to this creditor for 725*l.* money lent," &c. The [\*182 name of the plaintiff, who claimed as endorsee of the note, did not appear in the schedule at all. It was held that this was not a sufficient description of the debt to sustain the plea. *Beck v. Beverly*, 11 M. & W. 845, is also a very strong case. It was there held that the discharge of an insolvent debtor from a debt in respect of which he accepted a bill of exchange, is no discharge as to the bill in the hands of a third person, unless the holder's name is inserted in the schedule, or it be stated therein that he is unknown, pursuant to the statute 1 & 2 Vict. c. 110, s. 75. The 69th, 71st, and 75th sections of the act were also referred to.*

*John Lloyd*, in support of his rule, submitted that the bill having been given to induce Healey to forbear to oppose the defendant's discharge, was illegal in its inception, and could not be enforced, in whose hands soever it might be.(a)

(a) See *Clay v. Ray*, post, p. 188.



ERLE, C. J.—The plaintiff having paid the bill after the defendant's discharge, in satisfaction of his own liability thereon, the fourth plea is no answer. As between Litten and Dalton, there was no debt, until the former was called upon as surety to pay the bill. The plaintiff's claim, therefore, could not be comprised in the schedule, and consequently the defendant is not discharged from it.

The rest of the court concurring,

Rule discharged.

\*183]

\*THOMAS *v.* HUNT. June 25.

A license to A. to manufacture a patent article is an authority to his vendees to vend it without the consent of the patentee.

THIS was an action for the alleged infringement of a patent.

The declaration stated that the plaintiff was the first and true inventor of a certain new manufacture, that is to say, of improvements in the manufacture of soap; and thereupon her Majesty Queen Victoria, by letters-patent duly sealed in that behalf, to wit, under the great seal of the United Kingdom of Great Britain and Ireland, granted the said plaintiff, his executors, administrators, and assigns, the sole privilege to make, use, exercise, and vend the said invention within England for the term of fourteen years from the 5th day of November, 1855, subject to a condition that the said plaintiff should within six calendar months next after the date of the said letters-patent cause to be filed in the great seal patent office an instrument in writing under his hand and seal particularly describing and ascertaining the nature of the said invention and in what manner the same was to be performed; that the said plaintiff did within the time prescribed fulfil the said condition; and that the defendant during the said term did infringe the said patent-right: And the plaintiff claimed 1000*l.*, as also a writ of injunction to restrain the defendant from the repetition and continuance of the said injury, and the committal of any injury of the like kind by the defendant relating to the said patent-right: And the plaintiff also prayed that account might be kept and taken of all the moneys which had been or which during the pendency of this suit might be had and received or obtained by the defendant by the infringement of the said patent-right, and of the \*184] loss which the plaintiff \*had sustained or might sustain by reason thereof; and that the defendant might be by the court here ordered and compelled to pay the amount of all such moneys had or received or obtained by the defendant or lost by the plaintiff, as damages, to the plaintiff; and that the plaintiff might have such other and further relief as the court might order and adjudge in that behalf.

Eighth plea,—that the alleged infringement in the declaration mentioned was the sale by the defendant of certain soap manufactured by Lewis Cowan & Sons and George Hearn, and bought by the defendant from the said Lewis Cowan & Sons and George Hearn under and after certain agreements had been made and entered into between the said Lewis Cowan & Sons and the plaintiff and the said George Hearn and the plaintiff, respectively, whereby it was respectively agreed that

the plaintiff should permit the said Lewis Cowan & Sons and the said George Hearn to use the said invention and combination in the manufacture of soap, and respectively to have, enjoy, and sell the said soap so manufactured as aforesaid for their own use and benefit absolutely, and that the said Lewis Cowan & Sons and George Hearn should pay to the plaintiff a royalty on all soap so manufactured by them respectively as aforesaid; and that the said Lewis Cowan & Sons and the said George Hearn respectively paid the said royalty to the plaintiff in respect of the said soap in the earlier part of this plea mentioned, and did everything to entitle them respectively to sell the said soap; and that afterwards, in due course of business, the said Lewis Cowan & Sons and the said George Hearn sold the said soap to the defendant for large sums of money, and the defendant afterward resold the said soap, which was the infringement in the declaration mentioned.

To this plea the plaintiff demurred, the ground of \*demurrer stated in the margin being, "that the plea is no sufficient [\*185 answer to the action, and that the resale of the patent article by the defendant without the license of the patentee is an infringement of the patent." Joinder.

*Webster*, in support of the demurrer.(a)—The plea in this case raises substantially the same question as was raised in *Walton v. Lavater*, 8 C. B. N. S. 162 (E. C. L. R. vol. 98), where it was held that a sale in this country of a patent article imported from abroad is a "user" of the invention within the prohibition of the letters-patent. The question there, as here, was, whether a sale simpliciter was an infringement. As to this, Erle, C. J., says,—p. 185,—“It was contended for the defendant that there had been no infringement, because the defendant had only *sold* the articles in question, and that the mere *sale* of articles imported from abroad is not an infringement of the patent, though the making of them would be. I have attentively listened to the arguments of counsel derived from the old statute and the language of the grant. The words in the Statute of James are, ‘working or making.’ In the granting part of the letters-patent the words are, ‘make, use, exercise, and vend,’ and in the prohibitory part ‘make, use, or put in practice.’ All these words are susceptible of some of the constructions which have been contended for: but it appears to me to be clearly the intention of the Crown in granting letters-patent for a new invention, to prohibit and prevent third persons from using the patent article for the purpose of profit by selling. The object is, to give to the inventor the profit of his invention; and the most effectual way of defeating that \*object would be the [\*186 permitting others to derive from the sale of the patent article the profit which it was intended to secure to the patentee. It seems to me, therefore, that proof that a party has sold the patent article, without proof of his having made it or procured it to be made, would be good evidence to warrant a jury in finding that he has been guilty of an infringement. As to the circumstance of the goods having

(a) The point marked for argument on the part of the plaintiff was as follows:—

“That the license to certain persons to manufacture soap, is no authority to the defendant to vend such soap without the consent of the plaintiff.”

been imported from abroad, I should say, that, if this were simply the case of an importation, without any proof of knowledge on the part of the importer that the article imported was a patented article, the mere sale would be sufficient to charge him. But it is unnecessary to lay that down here; for, the defendant acted with full knowledge: he has not imported goods by hazard which have been made by another manufacturer; but he has imported articles with his own name stamped on them as the maker, which he well knew to be a violation of the patent. Being himself the patentee,<sup>(a)</sup> and having the privilege of manufacturing the article in France, and the articles having been imported by him from France, and bearing his name, it is clear to my mind that the jury would have been warranted in coming to the conclusion that the defendant manufactured them in France for the purpose of importing and selling them in this country, in violation of the English patent." Keating, J., expressed himself in similar terms. And Byles, J., said: "As to the selling the patent articles not being an infringement,—I will not say a word as to the principle: but, upon authority, the matter stands thus: there is no authority to show that it is not, and there are two distinct authorities to show that it is; for, in the case of *Minter v. Williams*, 4 Ad. & E. 251 (E. C. L. R. vol. 31), 5 N. & M. 647, 1 Webster's P. C. 135, every \*187] one of the learned judges \*gave his judgment upon the ground that exposing for sale was not selling, which leads one to the inference, as clearly as if it had been expressed in words, that, in their opinions, a vending or selling of the patented article is an infringement of the patent." <sup>(b)</sup> [WILLIAMS, J.—Suppose that, after having bought the soap manufactured by Messrs. Cowan & Son and Mr. Hearn, the defendant had died, what were his executors to do with it? It might constitute the entire assets.] That might present a difficulty. [KEATING, J.—How is the manufacturer to have the full benefit of his license, unless his vendees could sell again?] The court cannot hold that the vendee may resell, without overruling the case of *Walton v. Lavater*. [WILLIAMS, J.—Does not the license to manufacture and sell necessarily include all the privileges a vendee can have,—one of which is that of selling again? How can there be a doubt?]

*Aston*, contra,<sup>(c)</sup> was not called upon.

\*188] WILLIAMS, J.—The defendant is clearly entitled to \*judgment on this demurrer. The vendee of the licensee has all the

(a) The plaintiff was the assignee of the English patent.

(b) The other authority alluded to, was, the dictum of Tindal, C. J., in *Gibson v. Brand*, 1 Webster's P. C. 630.

(c) The points intended to be urged on the part of the defendant were as follows:—

"1. That an article manufactured under a license from the owner of a patent, and in respect of which a royalty has been paid to the owner of a patent, may be freely sold and resold by all the world:

"2. That otherwise the owner of a patent would be paid many times over in respect of the same article manufactured under a license from the owner of the patent:

"3. That the price of the article is increased by the royalty paid in the first instance by the licensee; and therefore the defendant, who paid such increased price to the licensee, has virtually paid the royalty for the article:

"4. That the license given to the licensees to manufacture, enjoy, and sell, includes a license to purchasers from the licensees to resell the article purchased by them."

privileges of a vendee, including that of selling again. The very object of the license would be frustrated if this were not so.

The rest of the court concurring,

Judgment for the defendant.

### CLAY v. RAY. May 27.

A., being about to compound with his creditors, in order to induce B. (one of them) to execute the deed, without the knowledge of the other creditors gave him two promissory notes for 25*l.* each beyond the amount of the composition. Upon the first of these becoming due it was dishonoured, and an action was brought upon it, and judgment obtained and execution issued. C., who was a party to the notes, in consideration of A.'s forbearing to enforce the judgment, gave him a guarantee for the amount of the judgment and the outstanding note; and thereupon the two notes were given up:—Held, that the guarantee was tainted with the original fraud, and therefore could not be enforced, notwithstanding part of the consideration for it was the giving up a judgment in an action in which the illegality might have been but was not pleaded.

THIS was an action upon a guarantee. The cause was tried before Willes, J., at the sittings in London, after last Hilary Term. The facts which appeared in evidence were as follows:—

The son of the defendant having proposed a composition with his creditors, of whom the plaintiff was one, in order to induce the plaintiff to execute the deed, two notes for 25*l.* each, to which the defendant was a party, were handed to him without the knowledge of the other creditors. The first of these notes being dishonoured, an action was brought upon it, and a judgment obtained, and execution issued. In order to induce the plaintiff to consent to a stay of proceedings upon that judgment, a bill of exchange for 49*l.* was given to the plaintiff (to which the defendant was no party), and a guarantee (joint and several) by the defendant and \*the son; and the two notes were given up. The guarantee made no mention of the judgment. [\*189

On the part of the defendant, it was submitted that the plaintiff could not recover, the transaction in its inception being tainted with illegality.

For the plaintiff it was insisted that the giving up of the judgment was a good consideration for the guarantee, however illegal the transaction out of which the judgment arose might be.

The learned judge directed a verdict to be entered for the plaintiff, reserving to the defendant leave to move, if the court should be of opinion that the guarantee was under the circumstances void and incapable of being enforced.

*Petersdorff*, Serjt., in Easter Term last, obtained a rule nisi accordingly.

*J. Brown* now showed cause.—The consideration for the guarantee was the giving up the judgment. [BYLES, J.—And in part the giving up of an illegal note which has never been turned into a judgment.] Does that make the guarantee void? The original notes were obligations of honour, which could not be enforced in a court of law. [BYLES, J.—How obligations of honour? The transaction was contrary to the policy of the law: the notes were void for fraud.

WILLIAMS, J.—Suppose a judgment security were given to induce a creditor to sign a composition-deed, would not that be void?] Possibly it would. Here, the defendant not having availed himself of the illegality as an answer to the action upon the first note, it is too late to set it up now: see the notes to *Underhill v. Devereux*, 2 Wms. Saund. 72 dd, citing *Baylis v. Hayward*, 4 Ad. & E. 256 (E. C. L. R. vol. 31), 5 N. & M. 613, *Bradley v. Urquhart*, 11 M. & W. 456, and \*190] *Bradley v. Byre*, 11 M. & W. 432. [BYLES, J.—\*Those were cases where a rule of law gave the party a defence: this is an illegal thing.] No case is to be found establishing the distinction. The rule is universal. *Transit in rem judicatam*. This is not illegality in the strict sense of the term: it has, no doubt, been held that these transactions are contrary to the policy of the law. The cases, beginning with *Cockshott v. Bennett*, 2 T. R. 763, are too numerous to admit of that being now questioned. [WILLES, J.—The cases have gone so far as to hold, that, where the money has been paid, it may be recovered back: *Smith v. Cuff*, 6 M. & Selw. 160. It was urged there that the parties were in *pari delicto*. But Lord Ellenborough said: "This is not a case of *par delictum*: it is oppression on one side, and submission on the other: it never can be predicated as *par delictum*, when one holds the rod and the other bows to it. There was an inequality of situation between these two parties: one was creditor; the other debtor, who was driven to comply with the terms which the former chose to enforce. And, is there any case where money having been obtained extorsively and by oppression, and in fraud of the party's own act as it regards the other creditors, it has been held that it may not be recovered back? On the contrary, I believe it has been uniformly decided that an action lies." In *Wilson v. Ray*, 10 Ad. & E. 82 (E. C. L. R. vol. 37), 2 P. & D. 253, the plaintiff being about to compound with his creditors, the defendant, a creditor, refused to subscribe the deed, unless he were paid in full. The plaintiff, to obtain his signature gave a bill payable to the defendant's agent for the difference between 20s. in the pound and 8s., the proportion compounded for. The defendant then signed the deed. The plaintiff did not honour the bill when due: but, on a subsequent application, he paid it, some months after the dishonour, by two instalments, to the payee, and the defendant received the \*191] \*money. The other creditors were paid according to the deed. It was held that the plaintiff could not recover back the amount paid to the defendant above 8s. in the pound; for that the transaction had been closed by a voluntary payment with full knowledge of the facts, and ought not to be reopened; and that it made no difference that the sum in question had not been recovered by action. Lord Denman, in delivering the judgment of the court, there said,—after referring to *Turner v. Hool*, Dowl. & R. N. P. C. 27 (E. C. L. R. vol. 16),—"Lord Tenterden considered that case, as I on the trial considered this case, to be decided by the principle clearly laid down in *Cockshott v. Bennett*, 2 T. R. 763, often recognised, and never impeached: but he was not reminded of another principle of at least equal importance, which was established in *Marriott v. Hampton*, 7 T. R. 269, that what a party recovers from another by legal process, without fraud, the loser shall never recover back by virtue of any

facts which could have availed him in the former proceeding. Money so recovered was not received to the plaintiff's use: it was received to the use of the successful party, by authority of law. If any error was committed in the former proceeding, still the plaintiff is estopped from proving it after failing to do so at that time. If this were otherwise, the rights of parties could never be finally settled by the most solemn proceeding; and verdicts and judgments might be rendered nugatory by evidence which, if produced at the proper season, might have received a complete answer." His lordship subsequently adds,—"I am reminded by my brother Patteson, that, in the present case, no action was brought on the bills in question, but they were voluntarily paid after they became due. *I think the same principle applies.*" [BYLES, J.—In *Atkinson v. Denby*, 6 Hurlst. & N. 778, the plaintiff, being in embarrassed circumstances, offered his creditors a [\*192 composition of 5s. in the pound. The defendant, a creditor, refused to accept it, unless the plaintiff paid him 50*l.* and gave him a bill of exchange for 108*l.* The other creditors would not accept the composition if the defendant did not. The plaintiff paid the defendant the 50*l.*, and gave him the bill of exchange, and the defendant then executed the composition-deed. The majority of the Court of Exchequer held (Martin, B., dissenting), that the plaintiff might recover back the money as money received to his use. And the decision was affirmed by the Exchequer Chamber: 7 Hurlst. & N. 934; Cockburn, C. J., saying,—“Where a debtor offers his creditors a composition, whereby they are all to receive the same proportionate amount in respect of their debts, it is contrary to the policy of the law to allow him to purchase the consent of one creditor by payment of his debt in full. It is said that both parties are in *pari delicto*. It is true that both are in *delicto*, because the act is a fraud upon the other creditors: but it is not *par delictum*, because the one has the power to dictate, the other no alternative but to submit.”] That case does not necessarily conflict with *Wilson v. Ray*. Suppose, instead of signing the guarantee, the defendant had paid the money; could he have recovered it back? [ERLE, C. J.—Perhaps not; but the question now before us, is, whether an action can be maintained upon that promise.] This is not an illegality in the ordinary sense of the term: for, an illegality cannot be waived: see the judgment of Parke, B., in *Stevenson v. Newnham*, 13 C. B. 285, 302 (E. C. L. R. vol. 76). Here, the defendant chose to waive the illegality, by not availing himself of it in the action upon the note. [ERLE, C. J.—The fraud is upon the general body of the creditors; and there is no sign of waiver by them.] *Took v. Tuck*, 4 Bingh. 224 (E. C. L. R. vol. 13), 12 J. B. Moore 435, was also cited.

\**Petersdorff*, Serjt., in support of his rule, referred to *Geere v. Mace*, 33 Law J., Exch. 50, 2 Hurlst. & Colt. 389. There, [\*193 the defendant being indebted to the plaintiff and other creditors, in order to induce the plaintiff to accept a composition, agreed to pay him an additional compensation, which was secured by a bill of exchange drawn by the plaintiff upon and accepted by the defendant's brother. The bill being dishonoured, and the plaintiff having threatened legal proceedings, the defendant by indenture assigned to the plaintiff a policy of assurance as a security for payment of the bill:

and it was held that the indenture was tainted with the illegality of the original transaction, and therefore could not be enforced. Bramwell, B., there says: "It seems to me, both in reason and on the authority of *Fisher v. Bridges*, 3 Ellis & B. 642 (E. C. L. R. vol. 77), that our judgment ought to be for the defendant. As to whether the defendant is in a better or worse position than if the original debt had been due from another person, I express no opinion. It is sufficient to say that he executed the indenture to secure the payment of an illegal debt, and, as that debt could not be enforced, neither can the security be enforced."

PER CURIAM (stopping *Petersdorff*).—The rule must be absolute.  
Rule absolute.

\*194]

\*FISH v. KELLY. May 25.

1. An attorney is not liable to an action for negligence at the suit of one between whom and himself the relation of attorney and client does not exist, for giving, in answer to a casual inquiry, erroneous information as to the contents of a deed.

2. A., B., & C. were employed in a manufacture in which secrecy was essential; and, to insure their fidelity, they were required to execute deeds under which a portion of their wages was to be invested in the name of a trustee, with a stipulation for determining the engagement on giving two months' notice, at the expiration of which, in the cases of B. and C., the money so invested was to be paid over to them, but, in the case of A., the deed was so framed as to make it payable only to his executors upon his death. D., the attorney for the employers, being upon the premises, was asked by A. if he would receive his money if he gave notice to quit the service; whereupon D. (not recollecting that A.'s deed differed in this respect from those of B. & C., though he himself drew them all, and had them in his custody), answered in the affirmative. Upon receiving this information, A. gave notice, but afterwards discovered that the money invested for him could only be paid to his executors:—Held, that A. could not maintain an action for the loss and disappointment sustained by him in consequence of his acting upon this mistake on the part of D.

THIS was an action against an attorney for alleged negligence in giving mistaken advice to one not a client.

The declaration stated, that, before and at the time of the making of the promise by the defendant thereafter mentioned, the plaintiff was employed as a workman at a certain large salary, under a certain deed bearing date the 1st of June, 1854, and made between one John Weston of the one part, and the plaintiff of the other part, *which said deed had been prepared by the defendant, and still continued in his care and custody*; and the plaintiff, being desirous of ascertaining the provisions and legal effect of the said deed, and his rights thereunder, and particularly whether, in the event of his giving notice according to the provisions of the said deed of his intention to leave his said employment, he would be entitled by the terms of the said deed to receive a certain large sum of money therein mentioned; and the defendant, then being an attorney and solicitor, undertook to inform, counsel, and advise him upon his rights aforesaid; and thereupon it became and was the duty of the defendant to use due care and skill in so counselling and advising the plaintiff: yet the defendant did not use due and proper care and skill in informing, counselling, and advising the plaintiff, but, on the contrary thereof, he so carelessly, negligently, and unskilfully advised and \*counselled the plaintiff, whereby [that thereby?] the plaintiff was induced to and

did give such notice as aforesaid, and the said employment was thereby determined, and the plaintiff had to leave and did leave the said employment in pursuance of the said notice, and then, trusting to the said information, counsel, and advice, unsuccessfully applied for payment of the said reserved fund, and lost the great benefits and advantages that would have accrued to him by the said deed, and which he might and would have enjoyed except for the said negligence and unskilfulness of the defendant: Claim, 500*l*.

The defendant pleaded,—first, that he did not promise as alleged, —secondly, a denial that he carelessly, negligently, or unskilfully advised and counselled the plaintiff, as alleged. Issue thereon.

The cause was tried before Williams, J., at the sittings in London after last Hilary Term. The facts which appeared in evidence were as follows:—In the year 1854, the plaintiff was engaged by one Weston, who was acting as manager for the trustees under an order of the Court of Chancery of the business of the late firm of Day & Martin, blacking manufacturers in High Holborn, to assist in the manufacture, together with two others named Gill and Brisley; these three being alone intrusted with the secret of the component parts and proportions of the article. Shortly after he entered the service, viz. on the 1st of June, 1854, the plaintiff executed a deed of that date, which purported to be made between John Weston, “manager of the trade of Charles Day, Esq., deceased,” of the one part, and the plaintiff of the other part. This deed recited that “the said Charles Day lately carried on the business of a blacking-manufacturer at and in the premises No. 97, High Holborn, and was possessed of and manufactured and prepared blacking according to a \*valuable recipe for the making and preparing blacking, the knowledge of which was [196] confined to him the said Charles Day, and the blacking before and at the time of executing those presents made and prepared in and for the purposes of the trade in those presents mentioned was made according to the said recipe.” It then recited the death of Charles Day, the proof of his will, the institution of the suit, and the appointment of Weston as manager: it then went on to recite, that, “in obedience to an order bearing date the 8d of May, 1854, made in the said cause, the said John Weston engaged and retained [the plaintiff] as and to be a workman in the service and employ of the said John Weston as such manager as aforesaid, on the terms thereafter mentioned; that, for the purpose of teaching [the plaintiff] how to do and thereby enabling him to do the work by him to be done in the said service and employ of the said John Weston, it would be necessary that the said John Weston should disclose to and intrust him with, and he would thereby unavoidably learn and become acquainted with, the said recipe and the secret art or mystery of making and preparing blacking from and according to such recipe, and the manner in which the same was then made and prepared in and for the purposes of the said trade; that it had been agreed by and between the said John Weston and [the plaintiff], that, in order to secure the due performance by [the plaintiff] of the covenants and agreements therein contained and by him to be performed, and the faithful discharge of his duty as such workman as therein mentioned so long as he should be in the said service and employ of the said John Weston, the yearly



sum of 50*l.*, part of the wages agreed to be paid to him as thereafter mentioned, should be retained by the said John Weston, and invested \*197] by him, by \*way of indemnity, in the manner and for the time therein mentioned, and that [the plaintiff] should execute and give to [the executors of Day] his bond," &c. The deed then witnessed that the said John Weston thereby, for himself, his heirs, executors, and administrators, covenanted with [the plaintiff], his executors and administrators (amongst other things), as follows,—that, so long as [the plaintiff] should be employed as a workman in the said trade, and should faithfully perform and discharge his duty as such workman, he the said John Weston would pay or cause to be paid to [the plaintiff] the weekly wages of 2*l.*, and would make the first of such weekly payments on the 3d of June, 1854, and also would on the 3d of June in each and every of the first ten years of the employment of [the plaintiff] as a workman in the said trade, invest for the benefit of [the plaintiff], in such manner and upon such terms as therein in that behalf mentioned, the further wages or salary of 50*l.* of like lawful money, and would make the first of such instalments on the 3d of June, 1855, and also would, on the 3d of June in each and every year after the expiration of the said first ten years, for so long time thereafter as [the plaintiff] should be employed as a workman in the said trade, pay or cause to be paid unto [the plaintiff] the further wages or salary of 50*l.*, and would make the first of such payments on the 3d of June, 1865: and, in case [the plaintiff] should happen to die, or, after due and proper notice of his intention so to do, withdraw from such employment as aforesaid on any day except the 3d of June, then and in any such case the said John Weston should and would, in such manner and upon such terms as therein in that behalf mentioned, invest a part of the sum of 50*l.*, which should bear the same proportion to the whole of that sum as the period which \*198] should have elapsed \*between the time of [the plaintiff] so dying or withdrawing and the last preceding 3d of June should bear to the whole year: And it was thereby mutually agreed and declared, that, in case either of the parties thereto should be desirous of determining the said service and employment of [the plaintiff], such party should give to the other of them two calendar months' notice, &c. And the [plaintiff] did thereby, for himself, his heirs, executors, and administrators, covenant with the said John Weston, his executors, administrators, and assigns, that he [the plaintiff] should not nor would at any time thereafter directly or indirectly divulge or make known to any person or persons whomsoever, either wholly or in part the said recipe, or any other recipe for the making and preparing of blacking, or the secret art or mystery of making or preparing blacking from and according to the said recipe, or any other recipe, or otherwise howsoever; and that [the plaintiff], whilst he should continue in the said service and employ of the said John Weston, would not, except in the performance of his work and duty as a servant or workman in such service and employ, make or prepare, or join or be concerned or interested in making or preparing blacking in any manner whatsoever, or according to any recipe whatsoever for sale on account of any person or persons whatsoever; and that, for seven years after the [plaintiff] should have ceased to be in the service

of the said John Weston as such mauager of the said trade as aforesaid, or of the manager for the time being of the said trade, [the plaintiff] would not within twenty miles from the said premises, No. 97, High Holborn aforesaid, make or prepare, or cause to be made or prepared, or be in any way concerned or interested in making or preparing according to any recipe whatsoever, or in any manner whatsoever, blacking for sale, \*and would not within such seven years [\*199 as aforesaid or within such distance of twenty miles aforesaid, set up or carry on, or be in any way concerned or interested in setting up or carrying on the trade or business of selling blacking: Penalty for breach 1000*l*: Covenant for investment of the 50*l*. a year in the 3 per cent. annuities in the name of Weston upon trust, "in case the said [plaintiff] shall perform and observe the several covenants and agreements herein contained, and by him to be performed and observed, and shall faithfully and efficiently discharge and perform his duty as such workman as aforesaid, and also all the duties incident to the employment as such workman as aforesaid, then, *from and immediately after the decease of the said [plaintiff]*, to pay and transfer the aggregate amount of the several shares and amounts of the said stock or fund which at the time of such decease shall have been purchased and invested according to these presents in that behalf, *unto the executors, administrators, or assigns of [the plaintiff]* as soon as conveniently may be after such his decease; and, in the meantime, and subject as aforesaid, upon trust to pay the dividends of the aggregate amount from time to time of the shares and amounts of the said stock or fund which shall have been purchased and invested as aforesaid, as the same dividends shall from time to time accrue and be received, unto [the plaintiff] or his assigns, for his and their own use: but, in case [the plaintiff] shall fail in the observance or performance of any of the covenants or agreements herein contained and by him to be observed or performed, or shall not properly or faithfully discharge and perform either his duty as such workman as aforesaid or the duties incident to his said employment as such workman as aforesaid, or any of them, then upon trust and to the intent and purpose that the said John Weston, his \*executors or administrators, shall and may [\*200 sell and dispose of any such aggregate amount as aforesaid of such shares and amounts as in that behalf aforesaid, or a sufficient part thereof, and out of the proceeds upon any such sale, or, without any such sale, out of the dividends of any such aggregate amount as aforesaid, if sufficient in that behalf, pay and make good any loss or damage which may accrue, arise, or happen in or to the said trade or the said testator's estate or otherwise howsoever, by reason or in consequence of any such breach of covenant, failure, neglect, default, or misconduct aforesaid of [the plaintiff], and shall pay the balance or surplus (if any) which shall remain after satisfying or making good such loss or damage as aforesaid unto [the plaintiff], *his executors, administrators, or assigns*; it being the true intent and meaning of these presents that the amounts of the said stock or fund which shall at any time hereafter be invested under and according to these presents shall be and remain vested in and under the control of the said John Weston, his executors or administrators, *so long as [the plaintiff] shall live*, as an indemnity against and as a fund out of and by

means of which full and ample compensation and amends may be made for and in respect of any such loss or damage as aforesaid."

Endorsed upon the deed was the following memorandum:—

"Day v. Croft.

"By an order dated 9th June, 1854, and made in this cause, it was ordered, that, notwithstanding the order bearing date the 3d of May, 1854, and the agreement or arrangement therein referred to, the within-named John Weston, the manager of the within-mentioned testator's trade, should be at liberty to pay to the within-named William Fish the sum of 50*l.* \*annually after he should have been \*201] ten years in his the said John Weston's service as manager of the said trade of the said testator, such ten years to be computed from the day of the date of this agreement, and when the said John Weston should also have deducted the sum of 500*l.* due to him and invested the same in Bank 3 per cent. annuities in his the said John Weston's own name, or until the further order of this court."

The plaintiff and the other two workmen, Gill and Brisley, continued in the service of the firm down to the time of the death of John Weston, the manager, which took place on the 9th of March, 1868. The plaintiff had duly received all dividends accruing under the deed; and at the death of Weston the sum invested in his name in trust for the plaintiff was 429*l.* 19*s.*

The defendant was the solicitor to the trustees of Day's estate; and, being upon the premises shortly after Weston's death, he inquired of the plaintiff, Gill, and Brisley, whether they were willing to continue in the service of the firm under the new manager, telling them that in that case the deduction and investment would be made as theretofore. Upon their inquiring whether, in the event of their giving notice to leave, they could have the moneys invested transferred to them, he answered them all in the affirmative. The plaintiff, Gill, and Brisley thereupon gave notice, and, at the expiration of the two months, quitted the service, and Gill and Brisley received their money: but it was then discovered that the plaintiff's deed differed from those executed by the other two, and that the accumulations in his case were payable only *to his executors after his death*,—a circumstance which the defendant had forgotten when he gave the answers he did, although all the three documents had been prepared by himself.

\*202] \*On the part of the defendant it was admitted that he was not responsible for the mistake, there being no relation of attorney and client between him and the plaintiff whence any contract or duty could be implied, and there being no suggestion that his answer to the plaintiff's inquiry had not been *bonâ fide*.

For the plaintiff it was insisted, that, to render an attorney responsible for negligence and want of skill, it was not necessary that the strict relation of attorney and client should have subsisted between the parties: but that, having undertaken to answer the plaintiff's inquiry, though acting gratuitously, the defendant was bound to see that the information he gave was correct, the more especially as he had the means of so doing in his own hands at the time.

The learned judge directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for him if the court should be of opin-

ion that the action could be maintained, and for such amount as the court should think fit.

*Powell, Q. C.* (with whom was *Morgan Lloyd*), now moved accordingly.—There was clear evidence of negligence; and, to render the defendant liable for that, it was not necessary that there should have been an actual retainer for reward.<sup>(a)</sup> [*WILLIAMS, J.*—There is no pretence for saying that there was any retainer. The only question is, was there any duty? The defendant was at the premises in his capacity of attorney for the trustees; and, a question being put to him by \*the plaintiff as to the effect of the deed of the 1st of June, 1854, he by accident gave him erroneous information.] The [\*203 defendant had the means of knowing the contents of the deed. He was the attesting witness, and his name was endorsed upon it as the attorney by whom it was prepared: and he had the custody of it. [*BYLES, J.*—What obligation was he under to the plaintiff?] The same degree of obligation at least as the law casts upon every gratuitous bailee.<sup>(b)</sup> In *Shiells v. Blackburne*, 1 H. Bl. 158, A., a general merchant, undertook voluntarily and without reward to enter a parcel of goods of B., together with a parcel of his own of the same sort, at the Custom House, for exportation, but made the entry under a wrong denomination, whereby both parcels were seized. It was held that A.,—having taken the *same care* of the goods of B. as of *his own*, not having received any reward, and *not being of a profession or employment which necessarily implied skill in what he had undertaken*,—was not liable to an action for the loss occasioned to B. *Heath, J.*, there says: “If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action.<sup>(c)</sup> The surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, *because his situation implies skill in surgery*. But, if the patient applies to a man of a different employment or occupation, for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies, to the best of his ability, such person is not liable.” [*ERLE, C. J.*—The surgeon holds out a certain profession of skill, and that he will do his duty in exercising it.] So, the \*attorney’s position implies a reasonable amount [\*204 of skill in his profession,—especially in reading and understanding the meaning of a legal document prepared by himself. The defendant here was not bound to answer the plaintiff’s inquiry. He might have declined to do so, or he might have demanded a fee. His duty was not the less to give correct information because he gave it gratuitously. [*BYLES, J.*—Would the defendant under the circumstances be liable in an action *ex contractu*?] It is submitted that there would be an implied contract: and, if necessary, the court may amend the declaration. Lord Loughborough, in the case already refer-

(a) See *Marshall v. The York, Newcastle, and Berwick Railway Company*, 11 C. B. 655 (E. C. L. R. vol. 73).

Where it is stated that the defendant was retained as an attorney, a reward need not be alleged; “for, the court will take judicial notice that he will not act without reward.” *Bourn v. Diggles*, 2 Chitt. R. 311 (E. C. L. R. vol. 18).

(b) See *Ronneberg v. The Falkland Islands Company*, ante, p. 1.

(c) *Seare v. Prentice*, 8 East 348.

red to, says: "I agree with Sir W. Jones,<sup>(a)</sup> that, where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence: but, if a man gratuitously undertakes to do a thing to the best of his skill, *when his situation or profession is such as to imply skill*, an omission of that skill is imputable to him as gross negligence." The same principle is laid down in *Wilson v. Brett*, 11 M. & W. 113, where it was held that a person who rides a horse gratuitously at the owner's request, for the purpose of showing him for sale, is bound, in doing so, to use such skill as he actually possesses; and, if proved to be a person conversant with and skilled in horses, he is equally liable with a borrower<sup>(b)</sup> for injury done to the horse while ridden by him.

ERLE, C. J.—I am of opinion that there ought to be no rule in this case. The action is brought by the plaintiff, a workman, against the defendant, an attorney, for having misinformed him as to the legal \*205] effect of a certain deed which regulated the terms of the \*engagement of the former with the firm by whom he was employed; in consequence of which the plaintiff was induced to give notice to determine such employment, and was disappointed in his expectation of receiving certain moneys which had been invested for his benefit under that deed. The evidence upon which the plaintiff relies to fix the defendant with liability, is, that the defendant, being the attorney who prepared the deed, and having it in his custody as solicitor for the plaintiff's employers, upon being asked for gratuitous information as to whether, in the event of the plaintiff's giving the notice which he contemplated, the money invested as above mentioned would be payable to him, assured him that it would; and that, the notice having been given, when the deed was looked at, it was found that the money only became payable to the plaintiff's representatives upon his death. If the defendant is liable at all, it must be either in respect of the breach of some contract express or implied, or of some legal duty. The bare statement of the facts shows that there was no contract. The plaintiff, meeting the defendant casually at the premises of his employers, asked him a question, which the defendant, without any intention to mislead, inadvertently answered incorrectly. There was no relation between the parties from which any contract could be implied. Then, was there any duty which the defendant owed the plaintiff from the breach of which any liability could arise? I am unable to find any relation between the parties from which a duty could arise. The defendant stood in the capacity of solicitor to the trustees of Mr. Day's estate. The defendant was a workman in their employ. They did not, therefore, stand in such a relation towards each other as to make it any part of the defendant's duty to give professional advice to the plaintiff. He was applied to because \*206] it was thought \*that he was in a position to be likely to give the required information. If Weston had been living, in all probability the inquiry would have been addressed to him. Under the circumstances, I do not think the defendant can be held responsible for the representation he made, unless it could be shown that at

(a) Jones on Bailments 120.

(b) See *Burnard, app., Haggis, resp.*, 14 C. B. N. S. 45 (E. C. L. R. vol. 108).

the time he made it he knew it to be false. That, however, is not suggested. The defendant was mistaken in supposing that the terms of the plaintiff's deed were similar to those of the deeds which had been executed by the two fellow-workmen of the plaintiff. In the case of bailments, the relative rights and duties of the bailor and bailee are well defined by the law. So, in the case of one who holds out a certain profession, the law supposes him to be of competent skill, and he is responsible for any failure in that respect, as is put by Heath, J., in *Shiells v. Blackburne*, 1 H. Bl. 158. From the holding out, the law implies a contract or a duty to exert competent and reasonable skill. So, in the case of a common carrier; he undertakes safely to carry goods intrusted to him, subject to certain well-known exceptions. In these cases a duty often arises beyond the contract which the law implies. But I am unable to perceive any duty arising out of the casual conversation here. The defendant happened to be an attorney. He was not attorney for the plaintiff: nor was he applied to in that capacity. For the mere mistake he is not liable.

WILLIAMS, J., and WILLES, J., concurred.

BYLES, J.—I entirely agree with all that has fallen from my Lord. There was no duty and no contract express or implied. In the case of a bailment, the intrusting the bailee with the chattel is treated as a consideration. So, in the case of the surgeon, the patient \*submits himself to the knife in reliance upon the public profession [\*207 which the practitioner holds out. This was not a mistake by an attorney in advising a client upon a question of law; but a mistake upon a matter of fact. If this sort of action could be maintained, it would be extremely hazardous for an attorney to venture to give an opinion upon any point of law in the course of a journey by railway. Rule refused.

### NAYLOR and Another v. MORTIMORE. June 24.

L. M., a trader, on the 31st of August, 1860, petitioned the Court of Bankruptcy for protection under the 211th section of the Bankrupt Law Consolidation Act, 1849, and a sitting was duly appointed pursuant to ss. 213, 215, and a proposal for compromise made by the debtor pursuant to s. 14.

The first sitting, which was held on the 26th of September, 1860, was adjourned to the 4th of October, and there was a further adjournment to the 25th of October, when the commissioner, on the application of the plaintiff's solicitors, adjudged M. a bankrupt, and adjourned his petition and all further proceedings thereunder into the public court. M. appealed against this decision, and on the 31st of January, 1861, the Lords Justices reversed it, and remitted the case to the commissioner for further consideration. The commissioner thereupon ordered the first sitting under the petition to be adjourned to the 13th of March, 1861, and that any further modification of the proposal be made and filed ten days before the day so appointed. On the 28th of February, M. accordingly filed a modified proposal to pay his creditors a composition of 10s. in the pound, by four instalments,—the first, of 4s. in the pound, to be paid in cash *within seven days* after confirmation by the court of any resolution agreed to by the creditors,—the second, of 2s. in the pound, on the 1st of June, 1861,—the third, of 2s. in the pound, on the 1st of December, 1861,—and the 4th, of 2s. in the pound, on the 1st of March, 1862; the three last instalments to be secured by the promissory notes of M., and to be guaranteed by A. and B. by their bond to the official assignee as trustee for the creditors; and the promissory notes to be ready for delivery to the creditors respectively *within ten days* after such modified proposal should have been agreed to and confirmed.

At the meeting of the 13th of March, 1861, the modified proposal was assented to by the required number of creditors who had proved, and a sitting appointed for the 3d of April, for its confirmation.

On the 8th of March, 1862,—the arrangement having been completely carried out by the payment of all the instalments,—M. obtained from the Court of Bankruptcy a certificate pursuant to the 221st section of the Bankrupt Law Consolidation Act, 1849:—

Held, that the certificate was not conclusive; but that it was competent to a creditor to show that the arrangement had not been duly carried into effect and the creditors satisfied.

2. Many of the creditors were paid the full amount of the composition at once in cash, but some of them not strictly within the seven days limited by the modified proposal: all the rest of the creditors (except the plaintiffs, to whom the cash and promissory notes were duly tendered, but who refused them) were paid the first instalment in cash, and received the notes for the other instalments in due course:—Held, that it was not competent to the plaintiffs to object to the mode in which the arrangement had been carried out quoad the other creditors.

3. The condition of the bond contained a stipulation by which it was to be void if the promissory notes should be ready for delivery to the creditors within the period limited, and if the second, third, and fourth instalments of the composition should be duly paid, or “if before any default should be made in payment of the said instalments or any of them, or any part thereof, M. should be adjudged a bankrupt in respect of any debt proved or provable under the said petition so filed by him as aforesaid:”—Held, that the introduction of the latter stipulation did not vitiate the bond.

4. Certain of M.'s creditors were public unincorporated companies and banking companies incorporated under the 7 G. 4, c. 46, or the 7 & 8 Vict. c. 113. These creditors were represented at the meetings, and assented to the resolution, by a person who acted for them under powers of attorney (not under seal) respectively executed by their managers, secretaries, or public officers, respectively, who did not appear to be authorized *under seal* to grant such powers of attorney, or otherwise than by virtue of their being such managers, &c.; but the respective banks which they represented had ratified their acts by receiving the composition:—Held, that the assents were properly given, and that, at all events, it did not lie in the mouths of the plaintiffs to make the objection.

5. Held also, that the proceedings were properly continued by the commissioner after the petition had been remitted to him by the Lords Justices.

6. The plaintiffs (who were the holders of three bills of exchange accepted by M. amounting to 331*l.* 19*s.*), for the purpose of putting themselves in a position to oppose the petition, at the first sitting, on the 26th of September, 1860, proved their debt. On the 7th of March, 1861, they commenced actions against M. upon these bills, and obtained judgments in those actions respectively on the 25th of March and 4th of April, 1861: and on the 26th of April, 1861, they brought an action upon those judgments:—Held, that the certificate, being a bar to the original debts, was equally a bar to the action upon the judgments.

THIS action was brought on the 25th of April, 1861, to recover 342*5**l.* 7*s.* 10*d.*, being the amount of two judgments recovered by the plaintiffs against the defendant, and interest thereon.

\*208] The cause came on for trial at the sittings in London after Michaelmas Term, 1862, before Willes, J., when an order of *nisi prius* was made, by consent, that a verdict should be entered for the defendant on all the issues, but subject to a special case for the opinion of the court as regards the issues raised by and arising out of the first, fifth, sixth, seventh, eighth, and ninth replications; and that the court should have power to draw all inferences of fact, and should be at liberty to amend the pleadings in such manner and upon such terms as they might think necessary or advisable, to determine the real questions at issue between the parties, and to decide how the verdict and judgment should be entered up on the issues raised by and arising out of the first, fifth, sixth, seventh, eighth, and ninth replications: and that, in the event of judgment being given for the plaintiffs upon the whole record, the court should say for what sum it was to be entered up.

\*209] \*1. The plaintiffs, John Naylor and George Arkle, are bankers carrying on business at Liverpool under the style or firm of Leylands & Bullen.

2. The defendant was a tanner in an extensive way of business at Andover, in Hampshire.

3. The action was commenced on the 25th of April, 1861, and was brought to recover the amount of two judgments recovered by the plaintiffs against the defendant in the Court of Common Pleas,—one judgment being dated on the 25th of March, 1861, for 1158*l.* 15*s.* 9*d.* (which included 4*l.* for costs of suit), and the other judgment being dated the 4th of April, 1861, for 2257*l.* 9*s.* 6*d.* (which included 6*l.* 6*s.* for costs of suit), making a total of 3416*l.* 5*s.* 3*d.*, together with interest thereon at 4*l.* per cent. from the date of the respective judgments.

4. The action in which the judgment of March 25th, 1861, was recovered, was brought by the plaintiffs on the 7th of March, 1861, under the Bill of Exchange Act, upon a bill of exchange dated June 23d, 1860, for 1182*l.* 14*s.* 7*d.*, drawn by Streatfield, Lawrence & Co., upon the defendant, payable to the drawers' order, four months after date, accepted by the defendant, and endorsed by the drawers to Lawrence, Mortimore & Co., and by them to the plaintiffs. The defendant did not appear to this action, and judgment was obtained for default of appearance.

5. The action in which the judgment of the 4th of April, 1861, was obtained, was brought by the plaintiffs on the 7th of March, 1861, against the defendant as acceptor of two bills of exchange for the sums of 955*l.* 7*s.* 7*d.* and 1221*l.* 4*s.* 1*d.*, respectively dated April 14th, 1860, and March 10th, 1860, drawn by Lawrence, Mortimore & Co., upon the defendant, payable to the drawers' order at four months after date, accepted by the defendant, and endorsed by the drawers \*to the plaintiffs. The defendant appeared to this action, but [210 suffered judgment to go by default.

6. Before the commencement of either of the said actions, and while the plaintiffs were holders of the said bills of exchange, namely, on the 2d of July, 1860, the defendant stopped payment; and, on the 31st of August, 1860, the defendant presented a petition to the Court of Bankruptcy for the London district, under the 211th section of the 12 & 13 Vict. c. 106.

7. The plaintiffs impeach, as will be hereafter seen, the regularity and validity of some of the proceedings under this petition: but the defendant, who has obtained the certificate hereinafter mentioned, contends, amongst other things, that the said certificate under section 221 is conclusive as to all steps in the proceedings antecedent to the obtaining thereof, and as to the regularity and validity of such proceedings.

8. On the 31st of August, 1860, one of the commissioners of the said Court of Bankruptcy acting in the matter of the petition, made the usual order for protecting the defendant from process till the 26th of September, 1860, and appointed a private sitting for the said 26th of September, 1860, for the proof of debts, and for the purpose of obtaining the assent of three-fifths in number and value of the creditors who should have proved debts to the amount of 10*l.* to a proposal for the future payment or for the compromise of the debts and engagements of the defendant, or to a modification thereof, as



required by the said act, and appointed G. J. Graham, an official assignee, to act in the matter of such petition.

9. On the 13th of September, 1860, the defendant filed his accounts in the Court of Bankruptcy, wherein it appeared that his liabilities amounted to 96,842*l.* 5*s.* 10*d.*, and his assets to 55,870*l.* 0*s.* 4*d.* He also then filed a proposal to pay his creditors a composition of 11*s.* in the pound.

\*211] \*10. At the first sitting under the petition, holden on the said 26th of September, 1860, of which meeting the plaintiffs had due notice, the plaintiffs, for the purpose of enabling them to oppose the said petition, proved their debt against the defendant on the said three bills of exchange, amounting together to 3314*l.* 19*s.*, including expenses. By the practice of the Bankruptcy court, a creditor who has not proved his debt is not entitled to oppose the petition or the proceedings under the same.

11. At the meeting of the 26th of September, 1860, a large proportion of the creditors of the defendant proved their debts. At the same meeting the above-mentioned proposal of the defendant was taken as read; and the plaintiffs by their attorney at once dissented therefrom, on the ground, as they alleged, that the defendant had not set forth in his petition the true cause of his failure: and they moved the commissioner to adjourn the case into the public court, and to adjudge the defendant a bankrupt. The defendant was examined at the said meeting; and, further time being required to complete the said examination, the sitting was adjourned to the 4th of October, 1860.

12. On the 4th of October, the sitting was again adjourned to the 25th of October, by order of the commissioner. At each of these meetings the defendant was examined and opposed by the plaintiffs.

13. On the 13th of October, 1860, the defendant filed a modified proposal under the petition, to pay his creditors a composition of 10*s.* in the pound, by five instalments.

14. At the adjourned meeting of the 25th of October, the court, on the application of the plaintiffs' solicitors, adjudged the defendant a bankrupt, and adjourned the defendant's petition and all further proceedings thereunder into the public court.

\*212] \*15. There was no formal adjournment of the said meeting of the 25th of October, 1860, other than may be implied from the said order of the commissioner; nor did the creditors of the defendant who had proved debts, or any of them, come to any resolution or vote at that meeting upon the said modified proposal of the 13th of October, 1860.

16. The defendant appealed to the Lords Justices against the commissioner's order of the 25th of October; and, on the 31st of January, 1861, the Lords Justices reversed the commissioner's decision, and remitted the case to him for further consideration: see *Ex parte Mortimore*, *In re Mortimore*, 30 *Law J.*, Bankruptcy 17.

17. On the 19th of February, 1861, after the above decision, on the motion of the defendant's solicitors, the commissioner in Bankruptcy ordered the first sitting under the petition to be adjourned to the 13th of March, 1861, and that any further modification of the proposal be made in writing and filed ten days before the day so appointed.

18. On February the 28th, 1861, the defendant filed under his said petition a modified proposal for paying his creditors 10s. in the pound by a cash payment of 4s. in the pound, and by three promissory notes each for 2s. in the pound, payable on the 1st of June and 1st of December, 1861, and 1st of March, 1862, to be secured by bond, as therein mentioned.(a)

\*19. On the 13th of March, 1861, being after the plaintiffs had commenced the actions mentioned in paragraphs 4 and 5, [\*218 the meeting under the petition ordered by the commissioner as above mentioned was held, but was not attended by the plaintiffs or their \*solicitors. The plaintiffs, however, had due notice of this [\*214 meeting.

(a) The modified proposal of this date was as follows:—

“In the matter of a petition for arrangement between Thomas Heard Mortimore, of, &c., and his creditors, under the superintendence and control of the Court of Bankruptcy.

“Further modification of proposal.

“In consequence of the delay which has occurred in the prosecution of his petition for arrangement, and the modified proposal filed on the 13th of October, 1860, having as to certain of the periods for payment thereby fixed become impossible to be carried out, the petitioner proposes further to modify his original proposal, and in lieu and place thereof proposes as follows:—

“To pay his creditors respectively a composition of 10s. in the pound upon the amounts and in full discharge of their respective debts, by four instalments, and in manner following, that is to say,—the first instalment of 4s. in the pound in cash within seven days after the court shall have confirmed any resolution of the creditors to accept this modified proposal,—the second instalment of 2s. in the pound on the 1st day of June, 1861,—the third instalment of 2s. in the pound on the 1st day of December, 1861,—and the fourth, being the last instalment of 2s. in the pound, on the 1st day of March, 1862: the last three of the said instalments to be secured by the promissory notes of the said T. H. Mortimore, and to be guaranteed by Mr. William Bouteher, of the firm of Bouteher, Mortimore & Co., Bermondsey, Surrey, leather-factors, and Mr. George Simmonds, of East Peckham, near Maidstone, in the county of Kent, tanner, by their bond to Mr. George John Graham, the official assignee, as trustee for the creditors; such bond to be settled by the commissioner, in case the parties differ about the same:

“The promissory notes to be payable in London, and to be ready for delivery to the creditors respectively at the office of the said official assignee, No. 25, Coleman Street, London, within ten days after this modified proposal shall have been agreed to and confirmed under and in conformity with the provisions contained in the Bankrupt Law Consolidation Act, 1849:

“Creditors holding bills accepted or endorsed by the said petitioner, to produce the same on receiving the composition notes:

“In the event of default being made in the payment of either of the said instalments, the original claims or debts of the creditors to revive and become forthwith due and payable by the said T. H. Mortimore, less the amounts received by the said creditors respectively under the said composition, but without prejudice to such guarantee:

“The petitioner to pay the remuneration and charges of the official assignee and messenger; such remuneration and charges to be settled by the commissioner in case the parties differ about the same: the petitioner also to pay his solicitors' and accountants' charges, and all other charges attending his petition and arrangement:

“Creditors holding property of the petitioner as security, not to be deprived of or prejudiced with regard to such security by accepting or agreeing to accept such composition; but such creditors to receive such composition on the amounts which would remain due to them after realising or giving credit for the value of such securities; such value to be agreed upon between the creditors and the petitioner, and, in case of difference between them, to be determined, at the expense of the petitioner, by the broker of the court for the time being acting under the commissioner before whom the petition is or may be in course of prosecution:

“Creditors holding securities from other persons, or holding third parties liable for their debts, not to be prejudiced in their rights or remedies as to or against such securities or third parties; but to receive the composition upon such amounts or balances as may be due to them at the time of proving their debts, or, if they shall not prove the same, then upon such amounts or balances as may be due to them at the date of the confirmation of the resolution of the creditors accepting the modified proposal.”

20. At this meeting, all the creditors of the defendant attended in person or by their agents, and proved their respective debts, to the amount of 108,610*l.* 10*s.* 5*d.*; and the said modified proposal of the 28th of February, 1861, was then read and submitted to the meeting; when it was resolved by all the creditors who had proved their debts, or by parties acting for them under powers of attorney as hereinafter mentioned, except the plaintiffs (such creditors being more than \*215] \*three-fifths in number and value of the creditors who had then proved debts of 10*l.* and upwards), that the said modified proposal of the 28th of February, 1861, should be assented to: and an order was made appointing another sitting under the petition for the 3d of April, 1861, to be held for the confirmation of such proposal.

21. The plaintiffs, as will be seen hereafter, object to certain powers of attorney used on behalf of some of the creditors at this meeting.

22. After the day for the second sitting had been appointed as afore-said, the defendant, on the 20th of March, filed and delivered to the messenger of the court a list of the creditors upon whom to serve notice of such second sitting. In this list the names of the plaintiffs were included, as follows,—“Naylor, John, and George Arkle, carrying on business as bankers at Liverpool under the firm of Leylands & Bullen.” The messenger, on the 22d of March, 1861, forwarded the notice of the said sitting of the 3d of April to his agent at Liverpool, who received it on Saturday the 23d of March. The said agent called at the plaintiffs’ place of business on Monday, the 25th, and Tuesday the 26th of March, for the purpose of serving them with the said notice; but, owing to their being absent from their said place of business, he was not able to effect such service on either of those days; and the plaintiffs were not in fact served with the said notice until the 27th of March.

23. On the 3d of April, 1861, the sitting so appointed as last afore-said was held, when the plaintiffs attended by counsel, and opposed the said modified proposal of the 28th of February, 1861, and objected to the proceedings under the petition, but raised no objection on the ground of want of notice of the meeting.

\*216] 24. This sitting was not attended by any creditor in \*person (except C. W. Kellow), but was attended by, amongst others, Mr. G. Dawes, the defendant’s solicitor, professing to act for a great many creditors of the defendant under certain powers of attorney, some of which are objected to, as mentioned below. The said modified proposal, which was in writing, and which had been signed and filed by the defendant on the 28th of February, as before mentioned, was then read; and the said Mr. Dawes, professing to have right so to do under the said powers of attorney, then signed the said proposal on behalf of more than three-fifths in number and value of the defendant’s creditors. The document (of which a copy was annexed to the case) purporting to be the proceedings at the said sitting, was then signed by one creditor, viz., Mr. C. W. Kellow, and by Mr. John Green Elsey and the said Mr. Dawes, Fred. L. Hutchins, Thomas Hayter, and Mr. Hughes, jun., on behalf of creditors.

25. Except as mentioned in the last paragraph, such proposal was

not put in writing and signed by any of the creditors, or any one on their behalf, at the said meeting of the 3d of April.

26. At the meeting of the 3d of April, in the presence of counsel for the plaintiffs, an application was made on the defendant's behalf to the commissioner acting in the said petition, for his approval and confirmation of the said modified proposal of the 28th of February, 1861: and thereupon the said commissioner, without objection by the plaintiffs' counsel, decided, that, unless he intimated to the contrary, the said proposal should be confirmed as of the 3d of April; but that the bond and other things need not be delivered out until the 10th of April; and that no party need attend on that day, unless he the commissioner intimated that he entertained a doubt. The commissioner did not make any such intimation; and thereupon, on \*the 10th of April, the order dated the 3d of April was made, [\*217 of which a copy was annexed to and formed part of this case.

27. Of those who signed the document purporting to be the proceedings at the sitting of the 3d of April, as mentioned in paragraph 24, the therein last four mentioned persons respectively professed to act as attorneys for the several creditors respectively whose names appear in the said proceedings under powers of attorney some of which are objected to by the plaintiffs, as mentioned below.

28. The said resolution was signed by the said G. Dawes expressly as attorney for the Bank of London, and also for the London Discount Company, Limited, and also for the National Discount Company, Limited; and by the said Frederick L. Hutchins for the Bucks and Oxon Union Bank, and by the said Thomas Hayter for the London Joint Stock Bank, and by the said J. G. Elsey as agent for the Bank of England.

29. The Bank of London is a corporate bank established by letters patent under the statute 7 & 8 Vict. c. 118; and Mr. Marshall, the acting manager of the bank, had proved under the said petition the debt due to the said bank, amounting to 2176*l.* 0*s.* 6*d.*; and the said Mr. Marshall, as such acting manager of the said bank, executed and gave to the said G. Dawes a power of attorney to act for the bank in the matter of the said petition. There was no power given to the said Mr. Marshall under the common seal of the bank, or otherwise, save by virtue of his being such acting manager, to give the said power of attorney to the said G. Dawes. The said Bank of London have never disputed the validity of the said power of attorney or the right of the said Mr. Marshall to give it; and they have since received the full amount of the composition agreed to under the said modified \*proposal, in respect of their said debt, and in full satisfaction [\*218 thereof.

30. The powers of attorney under which the said G. Dawes voted for and signed the said resolution on behalf of the London Discount Company Limited and the National Discount Company Limited, were executed and delivered to the said G. Dawes by Edward J. Woodhouse and Richard Price, respectively, who were secretaries of and duly proved on behalf of the said companies respectively, under the said petition, for the debts due to the said companies respectively, viz. 3184*l.* 8*s.* 11*d.* on behalf of the London Discount Company Limited, and 5,069*l.* 8*s.* 3*d.* on behalf of the National Discount Company Limited

There was no power given under the common seal of either of the said discount companies to the said secretaries respectively to give the said powers of attorney to the said G. Dawes: but the said powers were respectively made and given in the form usually adopted in the Court of Bankruptcy, and usually executed by the secretaries of the said discount companies. No objection has been made by the said companies, or either of them, to the validity of the said powers or either of them, or to the right of the said respective secretaries to give them; and both the said companies have since received the full amount of the composition agreed to under the said modified proposal, in respect of their said debts, and in full satisfaction thereof.

31. The London Joint Stock Bank is a copartnership of more than six persons formed before the year 1837, and carrying on business in London under the above style, by virtue of the statute 7 G. 4, c. 46, and entitled to sue and be sued by their registered public officer. George Taylor (who was then one of the registered public officers of the said bank) proved under the said petition a debt of \*219] 17,094*l.* 19*s.* 9*d.* due \*from the defendant to the London Joint Stock Bank; and the said George Taylor, under a special resolution passed by the directors of the said bank authorizing the public officers therein named (amongst whom was the said George Taylor), and each and every of them, to give such powers of attorney, executed and gave to the said Thomas Hayter a power of attorney to act for the bank in the matter of the said petition. No objection has been made by the said bank to the validity of the power, or to the right of the said George Taylor, as public officer, to give it: and the said bank has since received the full amount of the composition agreed to under the said modified proposal in respect of the said debt, and in full satisfaction thereof.

32. The power under which the said Frederick L. Hutchins voted for and signed the resolution of the 3d of April, 1861, on behalf of the Bucks and Oxon Union Bank (which bank is established and incorporated under letters patent dated the 9th of March, 1853), was executed and delivered to the said Frederick L. Hutchins by Richard Carter, then the secretary and manager of the said bank, and who had duly proved on behalf of the said bank, for the debt due from the defendant, namely 877*l.* 14*s.* 6*d.* The said power was made and given in the form and manner adopted in other cases by the said bank; but there was no power of attorney under the common seal of the bank authorizing the said Richard Carter to give such power to the said F. L. Hutchins. The said bank have never disputed the validity of the said power, or the right of the secretary or manager to give the same; and they have since received the full amount of the composition agreed to under the said modified proposal, in respect of their said debt, and in full satisfaction thereof.

\*220] \*33. The said J. G. Elsey voted for and signed the said resolution on behalf of the Bank of England, in respect of their proof of 9076*l.* 1*s.* 4*d.*, under a power of attorney under the seal of the said bank. The Bank of England have never objected to the validity of the acts of the said J. G. Elsey in the matter of the said petition: and they have since received the full amount of the

composition agreed to under the said modified proposal, in respect of their said debt, and in full satisfaction thereof.

34. The whole amount of the debts of 10*l.* and upwards proved against the defendant under the said petition on or before the said meeting of the 3d of April, 1861, was 103,637*l.* 10*s.* 5*d.* Three-fifths of this amount was 62,182*l.* 10*s.* 3*d.* Assuming that all the said powers of attorney the validity of which is disputed by the plaintiffs as aforesaid are valid, the assents given and signed to the said modified proposal by the said C. W. Kellow on his own behalf, and by the said George Dawes, Frederick L. Hutchins, J. G. Elsey, Thomas Hayter, and W. Hughes, jun., on behalf of other creditors as before mentioned, represented 84,583*l.* 10*s.* 2*d.* of debts in amount, and more than three-fifths in number and value of the creditors who had so proved. But, if the said powers of attorney given on behalf of the said several banks and discount companies, and above objected to, were all invalid, and the debts proved by them are deducted, then the assents to the said resolution were less than three-fifths in value of the debts of 10*l.* and upwards proved as above mentioned.

35. If the power of attorney given on behalf of the said London Joint Stock Bank was invalid, and if the power of attorney given on behalf of the Bank of England was also invalid, then the debts proved on behalf of the last-mentioned two banks, amounting \*together [221 to 26,171*l.* 1*s.* 1*d.*, being deducted from the assents, the remaining assents and signatures to the said resolution would be less than three-fifths in value of the debts of 10*l.* and upwards proved as above mentioned. But, if both the last-mentioned powers of attorney were sufficient, or if only that given by the London Joint Stock Bank was sufficient, then more than three-fifths in number and value of the creditors who had proved debts agreed to and signed the said resolution.

36. The defendant, in compliance with his said proposal of the 28th of February, 1861, executed a bond(a) on the 3d of April, 1861, as

(a) The bond was in the penal sum of 72,000*l.* It recited the filing of the defendant's petition on the 31st of August, 1860,—the order of protection of the same date,—the appointment of a private sitting on the 26th of September,—the appointment of Mr. Graham as assignee,—that the defendant on the 13th of September filed an account of his debts and estate, and made a proposal to pay a composition of 11*s.* in the pound,—that, on the 13th of October, he filed an amended and modified proposal,—that, on the 28th of February, a further amended and modified proposal was filed,—that the first sitting was adjourned and had since been duly held, and that a second sitting had been duly appointed and held on the 3d of April, 1861,—that the proposal of the defendant as so further amended and modified, and filed on the 28th of February, 1861, had been duly assented to and accepted and reduced into writing and signed by the requisite majorities of the creditors at the said several sittings, and had been duly approved and confirmed by the Court of Bankruptcy, and filed and entered on record.

The condition was, that, "if the said T. H. Mortimore shall duly make and have ready for delivery to the said creditors such promissory notes as mentioned in his said further and amended proposal of the 28th of February, 1861, in manner and within the period therein and in that behalf specified, and if the second, third, and fourth instalments of the aforesaid composition of 10*s.* in the pound upon the respective debts of the said creditors of the said T. H. Mortimore shall be duly paid at the respective times and in the manner in that behalf provided by the said further amended and modified proposal as aforesaid; or if, before any default shall be made in payment of the said instalments or any of them, or any part thereof, the said T. H. Mortimore shall be adjudged a bankrupt in respect of any debt proved or provable under the said petition so filed by him in the said Court of Bankruptcy as aforesaid,—then and in either of the said cases the above-written bond shall be void; otherwise, to remain in full force and effect: Provided always that the principal money intended to be secured by this bond is limited to 36,000*l.*"

did his sureties whose names were mentioned in the said modified \*222] proposal \*before it was agreed to. And, on the 10th of April, 1861 (as the commissioner had not made any intimation of an intention to alter his judgment confirming the said proposal), the defendant deposited with Mr. Graham, the official assignee, as trustee for the creditors, the promissory notes which had been prepared in pursuance of the said modified proposal, and also the said bond. The form of the bond was not formally submitted to the creditors, or to the plaintiffs, or to the official assignee: but the said bond lay on the table at the said sitting of the 3d of April, and was open to the inspection of any creditor. It was not settled by the commissioner, as no difference arose about the same between the parties; and no objection was made to the form of it by the plaintiffs or by any other creditor, or by the official assignee. It is now objected to by the plaintiffs as not being in compliance with said proposal.

37. On the 10th of April, 1861, the defendant tendered to the plaintiffs the composition of 10s. in the pound on the amount of the debt of 3314l. 19s. proved by them as above mentioned. The said tender was made as follows, that is to say, 4s. in the pound in cash, and three \*223] promissory notes, each of which was for \*one of the three instalments of 2s. in the pound: but the plaintiffs refused to receive the said tender. These promissory notes were then again deposited with the official assignee: and, on the days they respectively became due, they were again tendered to the plaintiffs, together with the respective amounts of the same in cash: these several tenders were also refused by the plaintiffs. On the 1st of March, 1862, the whole composition of 10s. in the pound was tendered in cash to the plaintiffs, and refused.

38. On the 8th of March, 1862, the defendant applied for and obtained from the Court of Bankruptcy a certificate purporting to be granted under section 221 of the Bankrupt Law Consolidation Act, 1849. On the same day, the court granted a certificate to the official assignee, purporting to be under section 222 of the same act.

39. Before the defendant applied for and obtained the said certificate, all the tenders had been made to the said plaintiffs as above mentioned, and all the creditors of the defendant except the plaintiffs had been paid by the defendant, and had accepted and received, in satisfaction and discharge of their respective claims against the defendant, the full amount of the said composition of 10s. in the pound upon their respective debts: and no objection was at any time made by any of them as to the time or mode of the payment of such composition.

40. Many of the creditors of the defendant were paid the full composition of 10s. in the pound in cash in one payment, without any promissory notes having been prepared for them. Of these, some who lived in the country were so paid on the 12th of April, 1861, and a few others who also lived in the country were not paid until after the 17th of April.

\*224] The question for the opinion of the court was, \*whether, under the circumstances stated, the defendant had any defence to this action.

If the court should be of opinion that he had a good defence, then

the verdict was to be entered on the several issues as the court might direct. If the court should be of the contrary opinion, then the verdict was to be entered for the plaintiffs for the amount of the said judgments, with interest thereon at 4 per cent. per annum.

*J. Brown* (with whom were *Lush*, Q. C., and *Yonge*), for the plaintiffs.(a)—The main question is, whether \*the proceedings [225 under the defendant's petition set out in the special case afford any defence to this action. That will depend upon the arrangement clauses of the Bankruptcy Act, 1849, 12 & 13 Vict. c. 106. The 211th section of that act enabled any trader unable to meet his engagements with his creditors to petition the court for protection. By s. 213 the Court of Bankruptcy was empowered to appoint a private sitting, at which (s. 215) creditors were to prove their debts as in bankruptcy, and, if three-fifths in number and value of those who had proved debts to the amount of 10*l.* and upwards assented to the proposal made by the petitioner, or to any modification thereof, a sitting for confirmation was to be appointed. By s. 216, if at the second sitting three-fifths in number and value of the creditors who had proved debts to the amount of 10*l.* and upwards agreed to accept such proposal as was assented to at the first sitting, the terms were to be reduced into writing, to be signed by the creditors, and the resolution so assented to and signed was to be binding on all; and the court, if it should think the resolution reasonable and proper to be executed, was \*to [226 approve of and confirm the same. By s. 217 any person duly authorized by letter of attorney from any creditor who had proved, was to be entitled to vote on the question of assent or dissent to the proposal of such petitioning trader. By s. 220 provision is made for

(a) The points marked for argument on the part of the plaintiffs were as follows :—

"1. That the proceedings, composition, and certificate under the defendant's petition to the bankruptcy court are not binding on the plaintiffs, and are no bar to this action :

"2. That the judgment-debts for which the action is brought having been recovered after the date of the defendant's petition in bankruptcy, were not affected or barred by the proceedings under the petition :

"3. That the proceedings under the defendant's petition were not in conformity to the Bankruptcy Act, 1849, and not binding on dissentient creditors :

"4. That no proposal or modified proposal of the defendant was assented to or signed by the requisite number and value of creditors at the first and second meetings under the said petition, or at any lawful adjournment thereof :

"5. That the meetings after the Lords Justices reversed the commissioner's decision were held without authority, and that the proceedings thereat were not binding on the plaintiffs :

"6. That the plaintiffs had not such notice as required by statute of the sitting of April 3d, 1861, and were not bound by the proceedings at that meeting :

"7. That the several powers of attorney for the banks and discount companies mentioned in paragraphs 27 to 35, were invalid, and that the resolution of the creditors was not legally signed or assented to by the said banks and discount companies respectively :

"8. That the bond mentioned in paragraph 36 was not a compliance with the modified proposal mentioned in the same paragraph :

"9. That the facts stated in paragraphs 39 and 40 show that the defendant did not carry out his modified proposal as to several other creditors; and that he gave some of them a preference over others and over the plaintiffs, by paying them cash in lieu of promissory notes; and that the plaintiffs are therefore not bound by the said proposal or the proceedings thereupon :

"10. That the certificate of the commissioner in bankruptcy mentioned in paragraph 38 was contrary to the facts apparent on the special case, and was in no way binding on the plaintiffs, and was of no force or validity in law :

"11. That the alleged proposal and composition of the defendant was for the above reasons of no force or effect as against the plaintiffs."



a special meeting in case any difficulty should arise in the execution of the resolution or agreement. And, when the resolution or agreement has been carried into effect, the court is (s. 221) to give the debtor a certificate, which is to operate to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy. In *Wesson v. Allcard*, 8 Exch. 260, it was held by the Exchequer Chamber,—affirming the decision of the Court of Exchequer in *Allcard v. Wesson*, 7 Exch. 753,—that a certificate granted by a commissioner in bankruptcy to a petitioning trader under the 221st section is not conclusive as to the fact of the resolution and agreement having been carried into effect and the creditors having been satisfied. The certificate under this section cannot be binding: it is only an *ex parte* proceeding: it may be and usually is obtained upon a mere affidavit by the attorney's clerk: whereas, in bankruptcy, the certificate can only be obtained upon a hearing, when the creditors may attend and oppose. [WILLES, J.—Are you not content with the decision of the Exchequer Chamber in *Wesson v. Allcard*?] This court will, no doubt, hold itself bound by that decision. [WILLES, J.—Do you rely on the point that the judgments were not recovered until after the petition?] Upon looking into the cases in bankruptcy, that point seems conclusively settled, if this is to be taken to be a proceeding analogous to bankruptcy. The Court of Bankruptcy seems to look at the judgment as a mere security for the debt. [WILLES, J.—The debt was provable: all the rest was mere accessory: see *Van Sandau v. Corsbie*, 3 B. & Ald. 13 (E. C. L. R. vol. 5); *Jamesson v. Campbell*, 5 B. & Ald. 250 (E. C. L. R. vol. 7).]

The next objection is, that there was no lawful adjournment of the meetings after the case was remitted to the commissioner by the Lords Justices. On the 25th of October, 1860, the commissioner adjudged the defendant a bankrupt, and adjourned his petition and all further proceedings thereunder into the public court. The Lords Justices, on appeal, reversed that order: and, on the 19th of February, 1861, the commissioner ordered the first sitting under the petition to be adjourned to the 13th of March. This he clearly had no authority to do. In the absence of an adjournment over pending the appeal, the proceedings dropped. The commissioner's functions were at an end when he adjudicated the defendant a bankrupt.

Then, the requisite number of creditors did not assent to the proposal of the defendant, unless those who voted by means of powers of attorney are taken into account. The 217th section of the act authorizes creditors to be represented at the meetings and to vote by persons delegated by them for that purpose under powers of attorney. Now, the assent here given on the part of the London Joint Stock Bank was given by Thomas Hayter who professed to be acting under a power of attorney granted to him for that purpose by George Taylor, the public officer of the bank. To make this instrument available it should have been under seal, or at all events it should have been shown that Taylor was authorized under seal. [WILLES, J.—This is not the case of a corporation. The public officer is authorized to receive the money, and to sue for it. He always represents the bank in proceedings in bankruptcy.] The question is, whether he has

authority to execute a deed; for, according to Co. Litt. 52 a., and the authorities cited in argument in *The King v. \*Fauntleroy*, 2 Bingh. 413 (E. C. L. R. vol. 9), 10 J. B. Moore 1, a power of attorney is a deed. The same objection applies to the assents given on behalf of the other banks and public companies: and, these being rejected, the necessary number of assents were not given. [WILLIAMS, J.—A warrant of attorney to confess judgment need not be sealed, unless it contains a release: *Kinnersley v. Mussen*, 5 Taunt. 264 (E. C. L. R. vol. 1). BYLES, J.—Suppose one of the creditors had been a married woman, having no trustee, if your argument be correct, she could not authorize any person to represent her.] Suppose one of the creditors was a lunatic, the same result would follow. The only consequence of the disability will be, that the particular creditor cannot vote. [WILLIAMS, J.—The question is set at rest by the decision of the Court of Bankruptcy in *Ex parte Ackroyd*, *In re Munroe*, 1 Mont. D. & De Gex 555, where it was distinctly held that a power of attorney by a banking company need not be by deed.]

Several of the creditors, it appears, were paid the full composition of 10s. in the pound in cash, instead of being paid the last three instalments by promissory notes: of these, some were paid on the 12th and some on the 17th of April, 1861; whereas, the time fixed by the proposal for the payment of the first instalment was the 10th. These clearly were not payments such as were contemplated by the agreement: consequently the certificate that the resolution or agreement had been fully carried into effect was not true. Now, the authorities are numerous to show that these arrangements must be strictly carried out: see *Evans v. Powis*, 1 Exch. 601, and the cases cited in the notes to *Cumber v. Wane* (1 Stra. 426), in 1 Smith's Leading Cases, 5th edit. 295. [WILLES, J., referred to *Clapham v. Atkinson*, 33 Law J. Q. B. 81, in error, 10 Law Times N. S. 908. WILLIAMS, J.—The question is, whether the resolution or \*agreement has been carried into effect and the creditors satisfied. Suppose one of them chooses to take something short of performance, who has a right to say that the creditors have not been satisfied? There is a case where a bond was conditioned to render the defendant in the palace court, and, the cause having been removed by certiorari to the Queen's Bench, a render to the Queen's Bench was held to be a performance of the condition.] There, the condition was carried out according to the intention of the parties. Here, those creditors who received 10s. in the pound in cash obtained an advantage over the rest. [WILLES, J.—This is not like a fraudulent agreement to prefer one creditor, made at the time of entering into the composition.]

Then, the bond is not in the form contemplated by the proposal. It was to have been an absolute security for the due payment of the last three instalments; whereas, the bond executed is made conditional upon the debtor not being adjudicated bankrupt before default made, in respect of any debt proved or provable under his petition,—the effect of which may be, that, in one event, the creditors may lose the benefit of the arrangement. [WILLIAMS, J.—The statute seems to contemplate that there may be some modification of the bond.]

*Manisty*, Q. C. (with whom was *Holland*), for the defendant, referred

to *Hunter v. Parker*, 7 M. & W. 332. He was stopped by the court.(a)

\*230] \*WILLIAMS, J.—I am of opinion that the defendant is entitled to our judgment. The main part of the case on behalf of the plaintiffs rested upon the decision of the Court of Exchequer in the case of *Allcard v. Wesson*, 7 Exch. 753, in error, 8 Exch. 260. That case has established that a certificate granted under the 221st section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106),—and which was relied on as a bar to this action,—is not conclusive as to the \*231] fact of the resolution and agreement having been carried into effect, and the creditors of the petitioning trader having been satisfied; and that, inasmuch as the 221st section only authorizes the commissioner to give a certificate in the event of the resolution or agreement having been carried into effect and the creditors of the petitioning trader having been satisfied according to the tenor thereof, it is competent to a creditor who seeks to impeach the validity of that certificate to show that in truth that condition has not been performed, that the resolution has not been carried into effect, and that the creditors have not been satisfied according to the tenor of the agreement.

Several objections have been urged by Mr. Brown on the part of the plaintiffs. In the first place, it was contended that the agreement had not been carried into effect, because a certain portion of the creditors had been paid the amount of the composition in cash, instead of in the mode described in the proposal which was assented to by the majority of the creditors, viz. by promissory notes, and because certain others of the creditors did not receive payment until a later date than it was proposed they should have done. I am of opinion that it does not lie in the mouth of the present plaintiffs to object that

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That all the proceedings and certificates set out in the case were regular and in accordance with the Bankrupt Law Consolidation Act, 1849, and are a bar to the claim of the plaintiffs in this action:

"2. That the certificate obtained by the defendant under s. 221 of that act is conclusive as to all steps in the proceedings antecedent to the obtaining thereof, and to the regularity and validity of such proceedings:

"3. That the plaintiffs are by their conduct as set forth in the case estopped from setting up irregularities, if any, in the proceedings:

"4. That, under s. 215 of the 12 & 13 Vict. c. 106, it was not necessary to give the plaintiffs notice of the second sitting, which was held on the 3d of April, as they had by their appointed agent been present at the first sitting:

"5. That, at all events, the plaintiffs have by their conduct waived and estopped themselves from setting up any irregularity as regards such notice:

"6. That all the powers of attorney objected to by the plaintiffs were regular: but that the plaintiffs should not be heard to dispute them, if irregular, inasmuch as the full composition has been received by the banks and discount companies, without any objection being raised by them, or any of them:

"7. That the bond was regular and in compliance with the proposal; but that, at all events, as the plaintiffs made no objection to it then, their present objection is too late:

"8. That, under the circumstances stated in the case, the payments to the different creditors were made in time, and in substantial accordance with the terms of the confirmed proposal:

"9. That the plaintiffs, who had tenders made to them at the proper times, cannot be allowed to set up the trifling irregularities (if any) as mentioned in paragraph 40 in the times of payment, inasmuch as all the creditors except the plaintiffs have received their full composition, and not one of them has made any objection to the mode or time of receiving such composition."

other creditors of the petitioning debtor have not been properly satisfied according to the agreement,—that the agreement has not been carried into effect quoad them in precise accordance with its terms. I think it is quite sufficient if in substance it appears that the creditors have been paid the stipulated composition, and that they are content with the mode in which the resolution or agreement has been carried into effect. A creditor who has refused to be a party to the arrangement ought not to be allowed to urge such an objection as this.

Then it was contended that such a bond was not \*given as [232] was contemplated by the proposal to which the general body of the creditors assented. The ground of this objection is, that, according to the proposal, the bond was to be given to secure the last three instalments of the composition; whereas, the condition of the bond actually given was, that the bond should be void if the second, third, and fourth instalments of the composition should be duly paid, or if, before any default should be made in payment of the said instalments, or any of them, or any part thereof, the petitioning debtor should be adjudicated a bankrupt in respect of any debt proved or provable under the petition so filed by him as aforesaid. But it appears that the bond was only intended to be given in order to secure the performance of that part of the resolution by which the instalments were agreed to be paid: and the instalments have been paid. The agreement therefore has been substantially carried into effect in this respect, if that which the bond was simply meant to be a security for has been accomplished. It would be very like an absurdity to hold that the agreement had failed because there was an informality in the bond which was to be given to secure the payment of the instalments, when all the instalments had been actually paid before the certificate was granted. It seems to me that the certificate cannot be invalidated by any such informality,—not to mention, that, in the events which have happened, the condition objected to could never attach. Under the circumstances, it appears to me that there is nothing in the form of the bond to show that the resolution assented to by the creditors has not been carried out, or that the creditors have not been duly satisfied.

The next objection urged by Mr. Brown turns upon the 217th section of the Bankrupt Law Consolidation Act, 1849, which provides that any person duly \*authorized by letter of attorney from [233] any creditor who has proved a debt to the amount of 10*l.* and upwards shall be entitled to vote on the question of assent or dissent to the proposal of such petitioning trader. Now, it is admitted by Mr. Brown that a sufficient number of creditors assented to the modified proposal of the defendant, provided the assents of all those who purported to have authority from creditors to assent were reckoned; but he has contended that some of those persons were not duly authorized, inasmuch as the only authority under which they could properly act was a letter of attorney under seal, or, in other words, by deed, and the persons giving the powers of attorney had no authority under the common seals of the respective companies to give them. It is quite true that for a variety of purposes a letter of attorney must be by deed, as in the case of a letter of attorney to deliver seisin, as put by Lord Coke in Co. Litt. 52, a, where he says

"Letter d'attorney is as much as a warrant of attorney by deed, for, *literæ doe signife sometime a deed, as literæ acquietanciæ doe signife a deed of acquittance; and herewith agreeth Britton, 101 b.*" Though with reference to certain subjects a letter or warrant of attorney must be by deed, it by no means follows that it should in all, and indeed in many cases it cannot be by deed. Some of these powers of attorney were executed by the managers or secretaries of unincorporated joint-stock companies or public officers of banking companies incorporated under the 7 G. 4, c. 46, or the 7 & 8 Vict. c. 113; and it did not appear that these parties had been authorized under seal to grant them. It seems to me that there is nothing in the objection: and indeed it may be very much doubted whether it is competent to these plaintiffs to take it. I by no means admit that the decision of *Wesson v. Allcard*, in the Court of Exchequer, and *Allcard v. Wesson* in \*234] the Exchequer Chamber, though full to the point that it is competent to a creditor to dispute the validity of the certificate on the ground that the resolution has not been carried into effect, and though the authorities are binding on us to the extent that a creditor may notwithstanding the certificate object that no proper notice was given to him, is also binding on us to the extent of saying that as to other matters the certificate is not conclusive as to the proceedings under the petition having been regularly taken. But it is unnecessary to enter into considerations of that kind here; for, the case of *Ex parte Ackroyd*, *In re Munroe*, 1 Mont. D. & De Gex 555, is a direct authority on the subject of the alleged informality. The very point was there raised and disposed of by Sir John Cross, then Chief Judge of the Court of Bankruptcy. Votes had been given on the choice of assignees, on behalf of two banking companies, viz., the Bank of Manchester and the West Riding Union Banking Company, under powers of attorney executed by the public officers of those associations, who, it was contended, had no right to delegate their authority. The learned judge, in giving judgment, says: "Here, the public officer of a company established by act of parliament, who \*235] must by the act be a partner in the company,<sup>(a)</sup> is \*authorized to represent the company in all legal and equitable proceedings whatsoever. He goes before the commissioner to prove a debt on behalf of himself and his copartners. I must consider him as a partner, since if he were not a partner he could not hold his office: and, considering him as a partner, I must hold that all those incidents belong to that character which belong to it in other partnerships, and

(a) The 7 G. 4, c. 46, s. 4, enacts, that, "before any such corporation or copartnership exceeding the number of six persons in England shall begin to issue any bills or notes, or borrow, owe, or take up any money on their bills or notes, an account or return shall be made out, according to the form contained in the schedule marked A. to this act annexed, wherein shall be set forth the true names, title, or firm of such intended or existing corporation or copartnership, and also the names and places of abode of all the members of such corporation, or of all the partners concerned or engaged in such copartnership, as the same respectively shall appear on the books of such corporation or copartnership, and the name or firm of every bank or banks established or to be established by such corporation or copartnership, and also the names and places of abode of two or more persons, *being members of such corporation or copartnership*, and being resident in England, who shall have been appointed public officers of such corporation or copartnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued, as hereinafter provided," &c.

which may reasonably and properly belong to it in such a partnership as this. Now, it is considered proper in ordinary partnerships that a partner may vote on behalf of the firm, by attorney, at the choice of assignees: and I see nothing unreasonable in applying that rule here."

Two other points were mentioned by Mr. Brown, but not much pressed. Indeed there is nothing in them. The one was, that the adjournment was informal. But I think that, when the Lords Justices remitted the matter back to the commissioner, the effect of that clearly was to restore it to its original state, for the commissioner to go on with it from the point at which the appeal took place. The other point was, that the judgments upon which the actions were brought were obtained after the date of the certificate. As to that the authorities are conclusive; and indeed the point was given up by Mr. Brown.

Upon the whole I am of opinion that there is no ground upon which the plaintiffs can impeach the certificate, and that it is a good bar to the action.

\*WILLES, J.—I am of the same opinion. The first objection divides itself into three heads. The first is, that, whereas [236 the arrangement was that the creditors were to receive promissory notes for the amount of three of the instalments, certain of them, instead of receiving promissory notes, received the full amount of the composition in cash. So far as those individual creditors are concerned, they got something more than they bargained for. The payment of the amount in money rendered the giving of the promissory notes to them a vain and useless act, because, if they had been given, the previous payment would at the time when the promissory notes fell due have operated of itself as satisfaction of the notes, so as to prevent their ever being of any practical utility: and, I apprehend, that, in the absence of any fraud upon the plaintiffs, or undue preference of those particular creditors,—neither of which is suggested,—it might as well be argued, that, if one of the creditors had thought fit altogether to release the debtor, and dispense with the payment of the money as well as with the giving of the promissory notes, there would be a failure to comply with the arrangement,—a conclusion so absurd as to require us to try some means of avoiding it. What we have to see, is, whether the resolution or agreement assented to and approved has been substantially carried into effect, regard being had to the object of all parties, which was that the creditors should be paid to the extent of 10s. in the pound on the amount of their respective debts. Provided that object has been attained, and the creditors who are willing to receive the composition are satisfied with the mode of doing it, the particular details may be treated as immaterial as between the debtor and a non-assenting creditor. I cannot conceive a case to which the maxim *Qui hæret in litera hæret in cortice* more forcibly applies than to the present.

\*The next objection is one pretty much of the same kind, [237 viz., that some of the creditors did not receive the first instalment of the composition until seven days after the time fixed for the payment of that instalment. If that had been the case with the creditor who relies upon the objection, it might, no doubt, have afforded

a good answer to the defence, as appears from *Hazard v. Mare*, 30 Law J., Exch. 97. In that case, to an action of debt, the defendant pleaded, that, after the accruing of the debt, he became bankrupt, and that, after the bankruptcy, he and P. R., in pursuance of the 230th section of the Bankrupt Law Consolidation Act, 1849, made an offer of composition, which was accepted by nine-tenths in number and value of the creditors, the offer being to pay 4s. in the pound in full satisfaction of his debts, such composition to be paid to all the creditors in cash within fourteen days after the second sitting to be appointed under the 230th section; that the court ordered the adjudication to be annulled; that P. R. joined in making the offer of composition in consideration of all the effects of the defendant being assigned to him by the defendant; that the defendant and P. R. paid the composition to the other creditors, and that the defendant had always been ready and willing to pay, and brought into court the amount of the composition on the plaintiff's debt ready to be paid to him. The Court of Exchequer held that the plea was bad, for not showing a payment or tender within the fourteen days. The same considerations, therefore, are, it seems, to be applied to deeds of composition under the 12 & 13 Vict. c. 106, as to ordinary composition deeds. But here the plaintiffs were not the persons whose payments were delayed: everything that was due to them under the resolution was tendered to them at the proper time: and it was only in respect \*238] of some \*few of the other creditors that accidentally, and not in consequence of any design which could in any way interfere with the plaintiffs' rights, the payment of the composition was postponed. Those creditors were content: and, their own rights only being in question, I apprehend it was competent to them to waive payment at the day.

The third objection is, that the bond was not such as the debtor engaged to give. The bond which by the proposal the debtor was to give, was, a bond to secure the due payment of the last three instalments of the composition. The bond which he gave was conditioned to be void if the debtor should make and have ready for delivery to the creditors such promissory notes as were mentioned in the amended proposal of the 28th of February, 1861, in manner and within the period therein and in that behalf specified, and if the second, third, and fourth instalments should be duly paid at the respective times in that behalf provided: and there was this further condition added,—“or if, before any default shall be made in payment of the said instalments or any of them, or any part thereof, the said T. H. Mortimore shall be adjudicated a bankrupt in respect of any debt proved or provable under the said petition so filed by him in the said Court of Bankruptcy as aforesaid,” the bond was to be void. As at present advised, I incline to think that, if Mr. Brown could have pointed out any person who could have effectually proceeded to an adjudication of bankruptcy against Mortimore, the bond would have been open to a very serious objection. But he has failed to point out any person who could do so; because, as to all persons bound by the resolution or agreement, I apprehend they were in this respect in the same condition as persons who have assented to a composition deed inde-

pendently of the act of parliament; and, in \*such a case, I apprehend, the rule is, that a person who has agreed to accept [\*239 a composition from his debtor could not, provided the debtor had fulfilled all the covenants or agreements in the deed on his part, or if the time for performance had not arrived, proceed to an adjudication in bankruptcy against him. There would in such case be no good petitioning creditor's debt, because it would be a violation of the agreement into which the creditor had entered with his debtor to molest him in any way before any default had been made by him in carrying out the new engagement which by agreement of the parties was substituted for the original debt. And creditors who have had notice of the proceedings under the act, and are bound by them, would equally be prohibited by the arrangement from taking any proceedings in bankruptcy before any default made by the debtor. It only remains, therefore, to see whether the bond could have been made void under this branch of the condition, by reason of proceedings in bankruptcy taken by a creditor who either had no notice of the proceedings or to whom an excepted debt was due. It does not appear from the case that any creditor existed by whom such proceedings could have been taken: we must, therefore, assume that none such in fact existed. The bond was under the circumstances a sufficient security according to the terms of the proposal which was assented to and confirmed. This objection consequently fails.

I now pass to a new head of objections,—those relating to the proceedings before the commissioner in which the proposal now under consideration was made and assented to. It is in effect an objection in the nature of a discontinuance under the former practice of the courts. Now, what are the facts? A proper petition for an arrangement was duly filed, and proper notices given. In the course of the \*proceedings, an order was made by the commissioner, that, [\*240 instead of proceeding with the private arrangement, the debtor be adjudicated a bankrupt and the proceedings adjourned into the public court. That order for the time put a stop to the proceedings under the petition. Then there was a competent appeal to the Lords Justices against that order, and they upon the hearing determined that the adjudication of the commissioner was erroneous, and remitted the matter back to him in order that the proceedings upon the petition should go on as before the interruption. Unless it can be said that the functions of the Lords Justices were merely to pronounce the commissioner's decision wrong, without reinstating the appellant in the position in which he stood before the erroneous order was made, one course only was possible, viz., that the commissioner should do as he did here, readjourn the case from the public court, into which it ought never to have found its way, and proceed with the petition under the arrangement clauses. That is what the commissioner did: and it appears to me that it was quite competent to him to make the adjournment and proceed as he did. The proper course was to place the matter in statu quo. The maxim *Non potest adduci exceptio ejusdem rei cujus petitur dissolutio*, is one of universal application in proceedings by way of appeal.

With respect to the objection that the proper assent was not given by certain of the creditors under the provision contained in the 217th



section of the statute, which enables persons authorized by letters of attorney to vote, I apprehend, for the reasons given by my Brother Williams, that a power of attorney given by the public officer of a joint-stock bank under the 7 G. 4, c. 46, or of any other public trading company under the 7 & 8 Vict. c. 113, in which public officer is \*vested the power to sue and to prove in bankruptcy in respect of debts due to the company, is a good power of attorney. That objection also therefore fails.

Then, there is a further objection, which is founded upon the fact that the debt now sued for was not an existing debt at the time these proceedings were first instituted, viz., by the filing of the petition for arrangement. As to that, I will only say that a discharge under the power of arrangement contained in the Bankrupt Law Consolidation Act, 1849, appears to have attributed to it by the legislature precisely the same force and efficacy as a discharge by certificate under an ordinary bankruptcy; and it is only necessary to refer to the class of cases of which *Van Sandau v. Corsbie*, 3 B. & Ald. 13 (E. C. L. R. vol. 5), is one, to show that, where a debt is barred, all accessories in the shape of damages and costs also are barred. And, as the certificate bars a debt in respect of which an action is pending at the date of the petition, though it does not ripen into a judgment until afterwards, any discharge of that debt discharges also those accessories which the law attaches to the debt.

I must own I am not dissatisfied at the failure of these numerous objections; for, perhaps, there never was a case of this sort in which the debtor has so thoroughly and substantially carried out his engagement as the present.

BYLES, J.—I also am of opinion that all the objections fail, giving the fullest effect to the means afforded by the decision in *Allcard v. Wesson*, confirmed by the Exchequer Chamber in *Wesson v. Allcard*, for upsetting these arrangements. As to the first point, all I shall say, is, that, where the debt is discharged by a certificate in bankruptcy, it has been held that a judgment subsequently obtained does not operate as a \*merger of the debt, but that the discharge from the debt operates a discharge from the judgment obtained thereon. In this, as in some other cases, the bankrupt law disregards some inconvenient distinctions which exist at common law. And, as to the objection to the adjournment of the meetings by the commissioner, it seems to me that it would be but a waste of time to add a word to what has been said by my Brothers Williams and Willes.

The next objection is, that, without the help of the joint-stock companies mentioned in the case, there was not a sufficient proportion of assents to the debtor's proposal, and that the assents given on behalf of those bodies were not properly given. That depends upon the 217th section of the Bankrupt Law Consolidation Act, 1849, which enacts that any person duly authorized by letter of attorney from any creditor who has proved a debt to the amount of 10*l.* and upwards, shall be entitled to vote on the question of assent or dissent to the proposal of such petitioning trader. These joint-stock companies, not being bodies corporate, could not appear at the meeting. Among such a numerous body, there must have been some shareholders under disability, such as married women, lunatics, or infants. Then

the statute provides that any person duly authorized by any creditor by letter of attorney may appear and vote. It may be observed here that the letter of the statute has been complied with: the person who assented on behalf of these joint-stock companies was authorized by letter of attorney. Was he *duly* authorized? The letter of attorney under which he in each case professed to act was executed by the secretary or public officer of the company. It is objected that he was not authorized under seal to give such power of attorney. If this were an instrument which by law was required to be under seal, no one of course could grant such a power unless himself empowered or authorized under seal to do so. But, looking at [\*243 the circumstances and the ordinary course of business, it is impossible that there could be an authority under seal. All the shareholders must act: the majority would have no power to affix the seal. Independently, therefore, of technical reasons, I should have no hesitation in saying that the statute was literally as well as substantially complied with. As soon as the party to whom the power of attorney was given appeared at the meeting, and agreed with the other creditors, and consented on the part of those whom he represented to forego a portion of their debt, the other creditors doing the like, it seems to me that there was a binding bargain which a court of equity would enforce, and which probably also might be made the foundation of an action at law. Besides, here the principals have afterwards actually accepted the composition. This would be a *ratihabitio*, which would render the transaction valid from the commencement. But we are relieved from all difficulty upon this objection by the decision in *Ex parte Ackroyd*, *In re Munroe*, 1 Mont. D. & De Gex 555, which is precisely in point.

The next objection which has been urged, is, that the agreement has not been carried into effect according to the tenor thereof. In the first place, it was said, certain of the creditors were paid the full amount of the composition by one payment in cash, instead of partly in cash and partly by promissory notes. Again, it is objected that others of the creditors were paid the first instalment of 4s. in the pound in cash, and the remaining instalments by promissory notes after the time stipulated by the proposal which was assented to and confirmed. This, it was urged, rendered the whole arrangement void. Indeed, Mr. Brown went so far as to contend, in answer to [\*244 questions which I put to him in the course of his argument, that, if these payments had been made five minutes after twelve o'clock on the night of the seventh day after the confirmation by the commissioner of the resolution of the creditors to accept the debtor's proposal, or if a counterfeit sovereign formed part of one of the payments, the whole would be frustrated and rendered void. These particular creditors do not complain of the way in which they have been paid; and, for the reasons already given, I think the plaintiffs ought not to be heard to make this objection.

The only point which has caused me any trouble is, the argument as to the form of the bond: but, when that comes to be fairly looked into, it seems to me to have as little foundation as the rest of the objections. The modified proposal of the 28th of February, 1861, provides that the composition shall be paid by four instalments, the first, of 4s. in

the pound, in cash, the other three, of 2s. in the pound each, by promissory notes at certain dates, to be guaranteed by the bond of two persons named. The objection to the bond was, that, besides the condition for payment of the promissory notes, it contained a condition that it should be void, if, before any default should be made in payment of the said instalments,—viz. the promissory notes,—or any of them, or any part thereof, the debtor should be adjudicated a bankrupt in respect of any debt proved or provable under the said petition so filed by him in the said Court of Bankruptcy as aforesaid. Before the certificate of the commissioner under the 221st section of the statute was given, a breach of this latter condition had become impossible: the whole of the instalments had been duly paid, and the debtor had not been adjudicated a bankrupt, and so the bond had become useless.

\*245] \*Giving, therefore, the fullest effect to all Mr. Brown's objections, I am clearly of opinion that there is nothing to prevent the certificate from being a complete bar to the claim in this action: and I entirely agree with my Brother Willes that it is rare indeed to see an arrangement of this sort so satisfactorily and faithfully carried into effect as this has been.

KEATING, J.—I entirely concur in all that has been said by the rest of the court, and especially do I concur in the last observation, as to the manner in which this arrangement has been carried out by Mr. Mortimore.

Judgment for the defendant.

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### READ v. EDWARDS. *July 4.*

An action lies against the owner of a dog, who, knowing the animal to have a propensity for chasing and destroying game, permits it to be at large, and the dog in consequence "breaks and enters" the plaintiff's wood, and chases and destroys young pheasants which are being reared there under domestic hens.

THIS was an action brought by the plaintiff to recover damages for the destruction by a dog belonging to the defendant of certain pheasants of the plaintiff.

The first count of the declaration stated, that, before and at the several times of the committing by the defendant of the grievances thereafter mentioned, the plaintiff was possessed of certain breeding-places for pheasants, and of certain pheasant-coops, which said breeding-places and pheasant-coops were then used by the plaintiff for the purpose of breeding and rearing pheasants; and the plaintiff was also then possessed of divers tame hens and pheasants, which said pheasants were at and during the times aforesaid, being reared and bred up by the plaintiff in the said breeding-places and pheasant-coops \*246] through and by means of \*the said hens, which said hens were kept and used by the plaintiff to brood, harbour, and cherish the said pheasants in the said breeding-places and pheasant-coops: that the defendant then wrongfully and injuriously kept certain dogs, he the defendant at and during the said several times aforesaid knowing the premises, and also then well knowing that the said dogs were used and accustomed to hunt, chase, pursue, and drive about pheasants,

and to kill and destroy the same; and at and during the several times aforesaid the defendant wrongfully and negligently behaved and conducted himself in and about the keeping and taking care of the said dogs, and the restraining, confining, and controlling the same; and the said dogs, whilst the defendant so kept the said dogs (and in the manner aforesaid), on divers days and times, to wit, between the 1st of July, 1863, and the 1st of August, 1863, by reason of the premises aforesaid, hunted, chased, pursued, and drove about the said pheasants, and killed and destroyed divers and very many, to wit, two hundred, of the said pheasants; whereby and by reason of the premises the plaintiff had been and was seriously damnified and injured, and divers moneys theretofore expended and laid out in and about and incident to the raising, rearing, feeding, taking care of, and watching the said pheasants, became and were wholly lost to the plaintiff; and the plaintiff had been also thereby deprived of the said pheasants, and of the enjoyment thereof, and had been prevented and hindered from therewith stocking his the plaintiff's woods and grounds with pheasants, and from having such recreation and pleasure therein as but for the premises he would have had; and had also thereby been deprived of divers gains and profits which otherwise and but for the premises he would have derived, and which might and would have accrued to him therefrom \*and from the disposal thereof; and [\*247 put to and had incurred great expense in and about the watching, keeping, and taking care of the said breeding-places, pheasant-coops, hens, and pheasants; and also by reason of the premises the plaintiff was forced and compelled to keep and employ a much greater number of servants and keepers to attend upon and superintend the same than otherwise and but for the premises he would or need have kept or employed.

The second count stated, that, on divers days and times, the defendant, then knowing that certain of his dogs were accustomed to hunt for and pursue game, and also then knowing that the plaintiff preserved and had game in the wood and plantation of the plaintiff thereafter mentioned, so negligently and carelessly controlled, kept, and restrained the said dogs near to the said wood and plantation, that through and by reason thereof the said dogs broke and entered the said wood and plantation of the plaintiff called Hockering Wood, situate at Hockering, in the county of Norfolk, and trod down, damaged, and destroyed the herbage, soil, and underwood thereof, and ran about, hunted, and chased therein, and hunted, chased, pursued, drove about, disturbed, killed, and destroyed the game, pheasants, hares, and rabbits which were in the said wood: by reason whereof large quantities of the said game, pheasants, hares, and rabbits were greatly terrified and affrighted and caused to leave the said wood and plantation, and were injured; and by reason of the premises the plaintiff had been and was seriously damnified and injured, and the plaintiff's right to shoot and sport in the said wood and plantation had been spoiled and damaged, and divers moneys theretofore expended and laid out in and about and incident to the raising, rearing, feeding, taking care of, and watching the said \*game, pheasants, hares, and rabbits became and were wholly lost to the plaintiff; and [\*248

the plaintiff was thereby caused to incur greater expenses than he would have done in and about the watching and taking care of the said wood, game, pheasants, hares, and rabbits; and the plaintiff had also been thereby deprived of the said game, pheasants, hares, and rabbits, and of the enjoyment thereof, and from having such pleasure and recreation therein as otherwise and but for the premises he would have had; and also thereby the plaintiff had been deprived of divers great gains and profits which otherwise and but for the premises he would have derived, and which might and would have accrued to the plaintiff therefrom and from the disposal thereof. Claim, 250*l*.

The defendant pleaded,—first, not guilty,—secondly (to the first count), that the said pheasants were not, nor were any of them, the plaintiff's, as alleged,—thirdly (to the second count), that the said dogs were not his, as alleged,—fourthly (to the second count), that the said wood and plantation were not the plaintiff's,—fifthly (to the second count so far as related to the alleged right to shoot and sport), that the plaintiff had no right to shoot or have sport, as alleged,—sixthly, (to the second count), that he did not know that the said dogs were accustomed to hunt for and pursue game, nor did he know that the plaintiff preserved and had game in the said wood and plantation, as alleged. Issue thereon.

The cause was tried before Cockburn, C. J., at the last Spring Assizes at Norwich, when the following facts appeared in evidence:—The plaintiff was possessed of a wood called Hockering Wood, about 200 acres in extent, in which he was in the habit of rearing and preserving pheasants and other game. In the summer of 1863, \*249] he had caused a large number of \*pheasants' eggs to be hatched under hens in a breeding-place about one hundred yards from the wood. When the broods were about eight weeks old, they were removed into the wood, together with the coops and hens,—the hens being kept in the coops, and the young pheasants allowed to run in and out at their pleasure. Whilst the young pheasants were so in the wood, viz. on the 17th and 19th of July, a pointer belonging to the defendant chased and worried them, killing or driving away (according to the evidence of the plaintiff's keeper and his assistant) about one hundred and sixty of them. It was proved that the defendant had had notice that his dog was in the habit of trespassing in Hockering Wood and chasing the game there; and, particularly, that, in the year 1862, he was informed of his having chased and killed there three hares and four rabbits, on which occasion he was threatened with an action by the plaintiff.

On the part of the defendant it was objected that the first count could not be sustained, inasmuch as there could be no property in pheasants, they being animals *feræ naturæ*.

Leave being reserved to him to move upon this point, the defendant's counsel proceeded to address the jury upon the second count,—contending that the evidence did not show that the pheasants in question had been destroyed by dogs, or that the dog was the defendant's dog; and that there was no proof of a scienter.

His Lordship left it to the jury to say,—first, whether the plaintiff's pheasants were destroyed by dogs,—secondly, if so, whether the defendant's dog was one of them,—thirdly, if so, was the propen-

sity of the dog to chase and destroy game, going out for that purpose of its own accord, known to the defendant. And he told them, that, if a man has a dog which has to his knowledge a propensity to any particular mischief, whereby injury may be caused to another, [\*250 it is the duty of the owner to restrain the dog from going on another man's land or premises to do the mischief and thereby cause the injury. But he reserved leave to the defendant to move, if the court should take a different view.

The jury returned a verdict for the plaintiff, damages, 5*l*. The verdict was taken upon the second count only.

*O'Malley*, Q. C., in Easter Term last, accordingly obtained a rule calling upon the plaintiff to show cause why the verdict should not be set aside and a verdict entered for the defendant, on the grounds,—first, that there was no evidence to go to the jury in support of the declaration,—secondly, that the second count of the declaration, on which the verdict was taken, was framed as for an infringement of the plaintiff's right of shooting and sporting, and there was no evidence of any infringement of such right; or for a new trial, on the ground that the verdict was against the weight of the evidence, or on the ground of the misdirection of the judge in leaving to the jury the question of the negligence of the defendant, and in not telling them that the destruction of the game was no ground of action; or why the judgment should not be arrested, on the ground that the second count of the declaration disclosed no ground of action. He submitted, that, though a man is responsible for injury done by an animal of a wild or ferocious nature, such as a lion or a tiger, whose propensities are known, yet, in the case of domesticated animals, he is only responsible for their acts where he has become aware by previous experience that they have acquired habits of ferocity or mischief: referring to the case of *May v. Burdett*, 9 Q. B. 101 (E. C. L. R. vol. 58). [WILLES, J., referred to *Mason v. Keeling*, \*1 Ld. [\*251 Raym. 608, and observed that the second count here was evidently founded upon the case in the Year Book, 20 E. 4, fo. 10, b.(a)]

(a) "In trespass for entering the plaintiff's close and depasturing his herbage with his beasts, per *Gery* (for the defendant), The action is not maintainable, for, the defendant says that all the men of D. had had common in 200 acres of moor from time whereof memory is not to the contrary, and that the plaintiff's land is adjoining to the 200 acres in which they were put, and that they entered into the land of the plaintiff without the defendant's knowledge, and immediately the defendant knew it he drove them out; wherefore he prays judgment, &c. *Briggs*: This is no plea; for, if he (the defendant) wish to prescribe, he ought to prescribe in a certain name, as, of a corporation. *Brian*: As far as this is concerned, the plea seems good enough: but it appears to me that the plea is naught for another cause; for, when he put his beasts in the common, he ought to use his common so that they do no wrong to another man. And, if the land in which he ought to have this common is not enclosed, as it is here, he ought to keep his beasts in the common and out of the land of another. *Littleton*: I think so too, for, I understand that this is the law. If a common road lies over the land of divers men, and if a drover come with his beasts and some of them go out of the way, he shall be punished in an action of trespass; and so here. *Townsend*: Here we say that we put in our beasts, and they were driven out of the common by wild beasts, to wit, dogs. *Brian*: What is this to the purpose? *Townsend*: In that case he may have an action against the master of the dog. *Nels*: Have you in your country wild dogs? This is wonderful. *Brian*: Notwithstanding you may have an action against the dog's master, still the plaintiff may have an action against you; as, if I bail goods to a man to keep, and a stranger takes them out of his possession, I may have an action against him or against my bailee. *Genny*: We traverse generally, not guilty. *Brian*: That is right; for, you or the dogs [dog's master?] should be punished, for, the plaintiff is injured wrongfully."

\*252] *Hayes, Serjt., and Metcalfe*, showed cause.—The \*second count alleges a trespass by the defendant's dog in the plaintiff's wood, and chasing and destroying game therein, not alleging them to be tame. [WILLIAMS, J.—The count cautiously abstains from calling the pheasants *the plaintiff's* pheasants. The pleader evidently had the fear of the rabbit case,—*Blades v. Higgs*, 12 C. B. N. S. 501 (E. C. L. R. vol. 104), in error 13 C. B. N. S. 844 (E. C. L. R. vol. 106),—before his eyes.] In that case it was held, upon the authority of *Rigg v. The Earl of Lonsdale*, 1 Hurlst. & N. 923, that the owner of land has a qualified property in game killed thereon by a stranger, *ratione solæ*. This is the case of young game, in which the owner of the soil would have a property *propter impotentiam*: see *The Case of Swans*, 7 Co. Rep. 15 b., 17 b., where Lord Coke says,—“There are three manner of rights of property, *scil.* property absolute, property qualified, and property possessory. A man hath not absolute property in anything which is *feræ naturæ*, but in those which are *domitæ naturæ*. Property qualified and possessory a man may have in those which are *feræ naturæ*; and to such property a man may attain in two ways,—by industry, or *ratione impotentiae et loci*; by industry, as, by taking them, or by making them *mansueta, i. e., manui assueta*, or *domesticæ, i. e. domui assueta*: but, in those which are *feræ naturæ*, and by industry are made tame, a man hath but a qualified property in them, *scil.* so long as they remain tame, for, if they do attain to their natural liberty, and have not *animum revertendi*, the property is lost, *ratione impotentiae et loci*; as, if a man has young shovellers or goshawks, or the like, which are *feræ naturæ*, and they build in my land, I have possessory property in them, for, if one takes them when they cannot fly, the owner of the soil shall have an action of trespass *quare boscum suum fregit, et tres pullos espervor' suor' or ardear' suar' pretii tantum, nuper in eod' bosco nidificant', cepit et* \*asportavit: and therewith agreeth the Register and F. N. B. \*253] 86 L., and 89 K., 10 E. 4, fo. 14, 18 E. 4, fo. 8, 14 H. 8, fo. 1 b., Standf. 25 b., Vide 12 H. 8, fo. 4, and 18 H. 8, fo. 12. But, when a man hath savage beasts *ratione privilegii*, as, by reason of a park, warren, &c., he hath not any property in the deer, or conies, or pheasants, or partridges; and therefore, in an action *quare parcum, warrennum, &c., fregit et intravit, et tres damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say ‘suos,’ for he hath no property in them, but they do belong to him *ratione privilegii* for his game and pleasure so long as they remain in the privileged place; for, if the owner of the park dies, his heir shall have them, and not his executors or administrators, because without them the park, which is an inheritance, is not complete; (a) nor can felony be committed of them; but of those which are made tame, in which a man by his industry hath any property, felony may be committed.” The second count here is clearly good, and is supported by the evidence. [BYLES, J.—Is it not enough for you to establish a trespass committed upon the land?] Yes. In *Sutton v. Moody*, 1 Ld. Raym. 250, 2 Salk. 556, 3 Salk. 290, 5 Mod. 375, 12 Mod. 144, Comb. 458, Comyns 34, Holt 608, it was held, that, where game is killed on the land of A,

(a) See *Morgan v. The Earl of Abergavenny*, 8 C. B. 768 (E. C. L. R. vol. 65).

the property thereof in him is absolute. [WILLES, J.—*Started and killed.*] Holt, C. J., in giving judgment in that case, says: "A warren is a privilege to use his land to such a purpose: and a man may have warren in his own land, and he may alien the land and retain the privilege of warren. But this gives no greater property in the conies to the warrener, for the property arises to the party from the possession; and therefore, if a man keeps conies in his close [\*254 \*as he may), he has a possessory property in them so long as they abide there: but, if they run into the land of his neighbour, he may kill them, for then he has the possessory property. *If A. starts a hare in the ground of B., and hunts it and kills it there, the property continues all the while in B.* But, if A. starts a hare in the ground of B., and hunts it into the ground of C., and kills it there, the property is in A., the hunter, but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C. But, if A. starts a hare, &c., in a forest or warren of B., and hunts it into the ground of C., and there kills it, the property remains all the while in B., the proprietor of the warren, because the privilege continues." And this is followed in *Carrington v. Taylor*, 11 East 571, *Keeble v. Hickeringill*, 11 East 574, n., and *Churchward v. Studdy*, 14 East 249, and also by the Exchequer Chamber in *The Earl of Lonsdale v. Rigg and Blades v. Higgs*. [BYLES, J.—In *Blades v. Higgs*, it was conceded throughout that the rabbits were wild. WILLIAMS, J., referred to the judgment of Willes, J., in *Cox v. Burbridge*, 13 C. B. N. S. 430, 440 (E. C. L. R. vol. 106), where that learned judge expresses a doubt as to the correctness of the distinction taken by Lord Holt in *Mason v. Keeling*, 1 Ld. Raym. 606, 608, "between horses and oxen, in which a man has a valuable property, and which are not so familiar to mankind, and dogs."] There can be no real difference in the responsibility of the owner, between the case of an ox or a sheep and a dog. A man having a right of way over the close of another, can have no more right to permit his beasts or his sheep to eat of his herbage, than he has to discharge a gun near to his decoy. [KEATING, J.—Why should not a man have a right to have his game undisturbed on his land?] There can be no good reason why he should not. [WILLIAMS, J.—You would not need these authorities if this were \*alleged and proved to have been a wilful trespass.] No. The question is, whether the defendant, having notice of the propensity of his dog to chase and destroy game, was not bound to restrain it. There was abundant evidence of the scienter. [BYLES, J., referred to Baron Wilde's judgment in *Blades v. Higgs*, 13 C. B. N. S. 852 (E. C. L. R. vol. 106), as being a correct exposition of the law on the subject of game kept as here. KEATING, J.—There was a similar case argued in the Court of Criminal Appeal in Michaelmas Term last; but judgment was deferred. WILLIAMS, J.—Is there any case of an action of trespass being maintained and damages recovered for killing the game?] The point was raised in *Hannam v. Mockett*, 2 B. & C. 984 (E. C. L. R. vol. 9), 4 D. & R. 518; but it went off on the ground that the birds there (rooks) were not alleged to be an article of human food. Bayley, J., however, in delivering the judgment of the court, goes very fully into the subject of the property in game. "The plaintiff," said that learned judge, "does not state any special



right in him to have the rooks resort to his trees; he relies upon that general right which all the King's subjects have, and he describes the profit to arise to him, not from the eggs, but from the killing the birds and their young. To maintain an action, the plaintiff must have had a right, and the defendant must have done a wrong. A man's rights are the rights of personal security, personal liberty, and private property. Private property is either property in possession, property in action, or property that an individual has a special right to acquire. The injury in this case does not affect any right of personal security or personal liberty, nor any property in possession or in action; and the question then is, whether there is any injury to any property the plaintiff had a special right to acquire. A man in trade has a right \*256] in his fair chances of \*profit, and he gives up time and capital to obtain it. It is for the good of the public that he should. But, has it ever been held that a man has a right in the chance of obtaining animals *feræ naturæ*, where he is at no expense in enticing them to his premises, and where it may be at least questionable whether they will be of any service to him, and whether, indeed, they will not be a nuisance to the neighbourhood? This is not a claim *propter impotentiam* because they are young, *propter solum* because they are on the plaintiff's land, or *propter industriam* because the plaintiff has brought them to the place or reclaimed them, but *propter usum et consuetudinem* of the birds. They, of their own choice, and without any expenditure or trouble on his part, have a predilection for his trees, and are disposed to resort to them. But, has he a legal right to insist that they shall be permitted to do so? Allow the right as to these birds, and how can it be denied as to all others? In considering a claim of this kind, the nature and properties of the birds are not immaterial. *The law makes a distinction between animals fitted for food and those which are not*; between those which are destructive of private property and those which are not; between those which have received protection by common law or by statute and those which have not. It is not alleged in this declaration that these rooks were fit for food; and we know in fact that they are not generally so used. So far from being protected by law, they have been looked upon by the legislature as destructive in their nature, and as nuisances to the neighbourhood where they are. That being so, surely a party can have no right to have them resort to his lands, to the injury of his neighbours: and, consequently, no action can be maintainable against a person who prevents their so doing. It has been said that a man \*257] may acquire rights over \*all animals *similis naturæ*, as affording him diversion, such as rabbits in a warren, or doves in a dove-cote. But first it is to be observed that rabbits and pigeons are not only subjects of diversion, but constitute an article of food. In 2 Inst. 199, it is said that 'the common law gave no way to matters of pleasure (wherein most men do excel), for that they brought no profit to the commonwealth; and therefore it is not lawful for any man to erect a *park*, *chase*, or *warren*, without a license under the great seal of the King, who is *pater patriæ* and the head of the commonwealth:' but, in the same page, it is said that 'fish-ponds, being a matter of *profit and increase of victuals*, any man may erect.' And, even with respect to animals *feræ naturæ*, though they be fit for food, such as

rabbits, a man has no right of property in them." He then refers to *Boulston's Case*, 5 Co. Rep. 104 b, (*Bowlston v. Hardy*) Cro. Eliz. 547, *Dewell v. Sanders*, Cro. Jac. 490, *Arnold v. Jefferson*, 3 Salk. 248, and *The Case of Monopolies*, 11 Co. Rep. 87, and to the statutes 24 H. 8, c. 10, 25 H. 8, c. 11, and 8 Eliz. c. 15, and concludes,—"*Keeble v. Hickeringill*, 11 East 574 n., bears a stronger resemblance to the present than any other case; but it is distinguishable. There it was decided that an action on the case lies for discharging guns near the decoy-pond of another, with design to damnify the owner by frightening away the wild-fowl resorting thereto, by which the wild-fowl are frightened away and the owner damnified. But, in the first place, it is observable that wild-fowl are protected by the statute 25 H. 8, c. 11; that they constitute a known article of food; and that a person keeping up a decoy expends money and employs skill in taking that which is of use to the public. It is a profitable mode of employing his land, and was considered by Lord Holt as a description of trade. That case, therefore, \*stands on a different foundation from [\*258 this. All the other instances which were referred to in the argument on the part of the plaintiff, are cases of animals specially protected by acts of parliament, or which are clearly the subject of property. Thus, hawks, falcons, swans, partridges, pheasants, pigeons, wild-ducks, mallards, teals, widgeons, wild-geese, black-game, red-game, bustards, and herons, are all recognised by different statutes as entitled to protection, and consequently, in the eye of the law, are fit to be preserved. Bees are property, and are the subject of larceny. Fisheries are totally different. The fish can do no harm to any one, and constitute a well-known article of food. Upon the ground, therefore, that the plaintiff had no property in these rooks, that they are birds feræ naturæ, destructive in their habits, and not protected either by common law or statute, and that the plaintiff is at no expense with regard to them, we are of opinion that the plaintiff had no right to insist upon having them in his neighbourhood, and that he cannot maintain this action." [WILLES, J.—Some of the reasoning of Bayley, J., in that case is not very satisfactory. WILLIAMS, J.—There was not any separate count for killing game.] No. But there was in *Rigg v. Lord Lonsdale*, 11 Exch. 654, a count in trover for carrying away game. [WILLIAMS, J.—Dead game. WILLES, J.—It is not alleged here that the pheasants were good for food.] *Lex spectat naturæ ordinem*: they are called game. [WILLES, J.—A wolf is game.] The statute 1 & 2 W. 4, c. 32, s. 30, recognises that there may be a trespass in pursuing game; and that even where the party charged does not actually enter upon the land. Sending a dog into a cover to drive out game, that the defendant might shoot it from the highway adjoining, was held to be a trespass: *The Queen v. Pratt*, 4 Ellis & B. 860 (E. C. L. R. vol. 82). To the same effect is [\*259 \**Dimmock v. Allenby*, cited in *Deane v. Clayton*, 2 Marsh. 577, 582. [WILLIAMS, J.—The law as laid down in *Sutton v. Moody* must bind us, though certainly the cases anterior to that are very difficult to reconcile. In *The Queen v. Pratt*, the offence was personally inciting the dog to go into the cover to drive out the game. This declaration is drawn upon the notion that negligence in not restrain-

ing the dog, knowing his propensity, was equivalent to inciting him to chase the pheasants.]

*O'Malley*, Q. C., and *Keane*, Q. C., in support of the rule.—The jury were not asked here to consider whether there was involuntary negligence. No doubt, a man is responsible for damage done by an animal of a dangerous or ferocious nature: if he chooses to keep these, he must do so at his peril. But, in the case of a dog, the owner only becomes responsible where it has previously been brought to his knowledge that the animal has acquired a habit of doing the particular acts complained of. An action does not lie for an involuntary trespass: *Mitten v. Faudrye*, Popham 161. *Doderidge, J.*, there says: "A man is driving cows through a town, and one of them goes into another man's house, and he follows him: trespass doth not lie for this, because it was involuntary, and a trespass ought to be done voluntarily." In 2 Rolle's Abridgment 566, pl. 1, it is laid down, that, if cattle in passage on a highway eat herbs or corn raptim et sparsim, against the will of the owner, it will excuse the trespass.<sup>(a)</sup> \*260] In *Beckwith v. Shordike*, 4 Burr. 2092, the court lay down, \*that, "if A. goes along a footpath, and his dog happens to escape from him and run into a paddock, and pull down a deer against his will, it is no trespass." And in *Brown v. Giles*, 1 Car. & P. 118 (E. C. L. R. vol. 12), it was held that a dog jumping into a field without the consent of its master, is not a trespass for which an action will lie. The form of the declaration in *Sutton v. Moody*, in some measure accounts for the judgment. [*WILLIAMS, J.*—We are bound by that case, confirmed as it has been by subsequent cases.] All the cases which have proceeded on the authority of *Sutton v. Moody*, have been decided upon the ground that what was taken was dead game. Where is this sort of liability to stop? Is a man to be held responsible for the act of his cat in killing his neighbour's canary bird, because he knows that the animal's natural propensity would lead it to do so? *Cur. adv. vult.*

*WILLES, J.*, now delivered the judgment of the court: <sup>(b)</sup>—

We discharge the rule to enter a nonsuit, because the declaration was proved, and that in a sense in which there was a cause of action.

The question was much argued, whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as in the case of an ox. And reasons were offered, which we need not now estimate, for a distinction in this respect between oxen and dogs or cats, on account,—first, of the difficulty or impossibility of keeping the latter under restraint,—secondly, the slightness of the damage which their wandering ordinarily causes,—thirdly, the common usage of mankind to allow them \*261] \*a wider liberty,—and lastly, their not being considered in law so absolutely the chattels of the owner, as to be the subject of larceny.

It is not, however, necessary in the principal case to answer this

(a) Si home ad un chemin oustre mon terre pur ses avers a passer, et les avers pasce les herbes per morcells en passant, ceo est justifiable. P. 15 Jac. B. R., *Reeve and Downes*: per Curiam. Encontre son volunt ceo esteant come est d'estre intend."

(b) The judges present at the argument were, *Williams, J.*, *Willes, J.*, *Byles, J.*, and *Keating, J.*

question: because it was proved at the trial that the dog which did the damage was of a peculiarly mischievous disposition, being accustomed to chase and destroy game on its own account, that that vice was known to its owner, the defendant, and that he notwithstanding allowed it to be at large in the neighbourhood of the plaintiff's wood, in which there were game; so that the entry of the dog into the wood, and the destruction of the game, was the natural and immediate result of the animal's peculiarly mischievous disposition, which his owner knew of, and did not control.

As to the property damaged being game, we think this is no answer to the action, because the law recognises in the proprietor of land a qualified right to game whilst it is upon the land.

We also discharge the rule to arrest the judgment, because, after verdict, the declaration may be read as capable of being, and therefore must be taken to have been, as in fact it was, proved in an action able sense.

Rule discharged.

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**\*HILL and Others, Administrator and Administratrix of the Estate of MARY HILL, deceased, v. NUTTALL. [\*262 June 17.**

1. H. & Sons being engaged, under a contract in writing, in the erection of certain engineer's work for N., for which iron and brass castings were required, and Hill, the founder from whom the castings were procured, having a claim against H. & Sons to the amount of 218*l.* for goods already supplied, and refusing to continue the supply without obtaining payment or security for that sum, N. consented to give Hill a guarantee in the following terms:—"May 22, 1861. Mr. J. N. agrees to pay to Mrs. Hill, iron-founder, on H. & Son's account, the sum of 218*l.*, being the amount owing to her by them, together with interest, in six months from the above date, providing he has work done as security for the same.

In an action by the representatives of Hill against N. upon this guarantee:—Held, that it was a condition of N.'s liability thereon, that, at the end of the six months, work should have been done by H. & Sons for him in respect of which a debt should be due from him to them: and that the plaintiffs could not recover without producing the contract between H. & Sons and N. under which the work was done.

2. To induce Hill to go on with the castings in the meantime, the following memorandum was drawn up and signed by her, by H. & Sons, and by N.:—"May 22, 1861. M. Hill agrees to make and deliver casting required for N.'s shed, as usual, and N. to pay for the same in monthly payments on H. & Son's account:"—Held, that the representatives of Mrs. Hill were entitled to recover from N. the price of castings delivered to H. & Sons under this agreement, without showing that they were used by them in the works done for N.

THIS was an action to recover money alleged to be due from the defendant to Mary Hill, deceased, under a guarantee.

The first count of the declaration stated that William Hanson, Richard Hanson, John Hanson, and Joseph Hanson (who were and are the persons referred to in the documents thereafter set forth as William Hanson & Sons) had been before the time when the agreement thereafter mentioned and when the said documents were made, and were at the said time, employed by the defendant in doing certain work at the defendant's shed thereafter referred to, and had before the said time provided certain materials for the said work; and the said Mary Hill had before the said time sold and delivered to the said William Hanson & Sons certain castings, which had been used and fixed by the said William Hanson & Sons in and about the said work

so done by them for the defendant; and at the said time the said William Hanson & Sons were indebted to the said Mary Hill in certain money, to wit, 218*l.*, being the money mentioned in the first of the said documents; and thereupon, in consideration that the said \*263] Mary Hill would forbear and give time \*to the said William Hanson & Sons for the said money so due to her the said Mary Hill, for the period of six months mentioned in the first of the said documents, and, for the considerations thereafter appearing, it was agreed by and between the defendant (who was the person surnamed Nuttall in the said document), the said Mary Hill (named therein), and the said William Hanson & Sons, by the said Richard Hanson, respectively, as appears by certain documents of which the following are copies,—“Barnoldswick, May 22d, 1861. Mr. James Nuttall, of Barnoldswick, agrees to pay to Mary Hill, iron-founder, Colne, on William Hanson & Sons' account, of Skipton, the sum of 218*l.*, being the amount owing to her by them, together with interest for the same, in six months from the above date, with interest up to this time, Nov. 22d, 1861, providing he has work done as security for the same. JAMES NUTTALL.” “Colne, May 22d, 1861. Mary Hill agrees to make and deliver casting required for Mr. Nuttall's shed, of Barnoldswick, as usual, and Mr. James Nuttall to pay for the same in monthly payments on William Hanson & Sons' account, of Skipton, to which agreement we the undersigned agree too. MARY HILL. RICHARD HANSON. JAMES NUTTALL.” Averment, that everything had been done and happened, and all requisite times elapsed, to entitle the plaintiffs, suing as aforesaid, to be paid by the defendant the said 218*l.*, with interest for the same as aforesaid, or any part thereof, and the said sum and the said interest are wholly due and unpaid, and further, although the said Mary Hill, in pursuance of the said terms made and delivered casting required for the purpose in the said second document mentioned, as usual, and everything had been done and happened, and all requisite time elapsed, to entitle the plaintiffs, \*264] suing as aforesaid, to be paid for the said casting so \*made and delivered as last aforesaid: yet the defendant had not paid for the said casting, and certain money, to wit, 50*l.*, was still due and unpaid for the same.

The second count stated that the defendant, in the lifetime of the said Mary Hill, on the 22d of May, 1861, in consideration that the said Mary Hill would forbear and give time to William Hanson & Sons, mentioned in the agreement thereafter stated, for payment of a certain debt of 218*l.* mentioned in the said agreement, then due by them to the said Mary Hill, agreed with the said Mary Hill on the terms contained in a document of which the following is a copy,—“Barnoldswick, May 22d, 1861. Mr. James Nuttall of Barnoldswick agrees to pay to Mary Hill, iron-founder, Colne, on William Hanson & Sons' account, of Skipton, the sum of 218*l.*, being the amount owing to her by them, together with interest for the same, in six months from the above date, with interest up to this time, November 22d, 1861, provided he has work done as security for the same. JAMES NUTTALL.” Averment, that everything had been done and happened, and all requisite times elapsed, to entitle the plaintiffs, suing as aforesaid, to be paid by the defendant the said 218*l.*, with

interest as aforesaid: yet the defendant had not paid the said sum, with interest for the same as aforesaid, or any part thereof; and the said sum and the said interest were wholly due and unpaid.

The third count stated that the defendant agreed with the said Mary Hill in her lifetime on the terms contained on the defendant's behalf in an agreement made between the said Mary Hill and William Hanson & Sons, by Richard Hanson, with their authority, and the defendant, in a document of which the following is a copy,—“Colne, May 22d, 1861. Mary Hill agrees to make and deliver casting required for Mr. \*Nuttall's shed, of Barnoldswick, as usual, [\*265 and Mr. James Nuttall to pay for the same in monthly payments on William Hanson & Sons' account, of Skipton, to which agreement we the undersigned agree too. MARY HILL, RICHARD HANSON, JAMES NUTTALL:” Averment, that, although the said Mary Hill, in pursuance of the said terms, made and delivered casting required for the purpose in the said document mentioned, as usual, and everything had been done and happened, and all requisite times elapsed, to entitle the plaintiffs, suing as aforesaid, to be paid for the said casting so made and delivered as last aforesaid: yet the defendant had not paid for the said casting, and certain money, to wit, 50*l*., was still due and unpaid for the same.

There was also a count for money received, goods sold and delivered, work and materials, interest, and money found due upon accounts stated.

The defendant pleaded,—first, as to so much of the first count as related to the first breach in that count assigned, that he did not agree as in the said first document in the said first count mentioned,—secondly, as to so much of the said first count as related to the said first breach, that work was not done by the said William Hanson & Sons as security for the defendant's said guarantee,—thirdly, to the said first breach of the said first count, a denial of the said breach and every part thereof,—fourthly, to the second count, that the defendant did not agree as alleged,—fifthly, to the second count, that work was not done by the said William Hanson & Sons as security for the defendant's said guarantee,—sixthly, to the second count, a denial of the alleged breach and every part thereof,—seventhly, to the money counts, except as to 9*l*. and 14*s*. parcel of the money claimed, never indebted,—eighthly, as to the second breach of the first count, and as to the \*third count, and to 9*l*. and 14*s*., parcel of the money [\*266 claimed under the money counts, that the money claimed under the second breach of the first count and under the third count was the same 9*l*. and 14*s*. as the said 9*l*. and 14*s*. parcel of the money claimed under the said money counts; and, as to the said 9*l*. and 14*s*., the defendant brought into court the sum of 9*l*. and 14*s*., and said that the said sum was enough to satisfy the claim of the plaintiffs in respect of the matter therein pleaded to,—ninthly, that there never was any account stated as alleged.

The plaintiffs joined issue on the first seven pleas respectively, and replied to the eighth by admitting the payment into court as alleged and joining issue as to the rest of the plea, and new-assigned as to the eighth plea that they sued in this action, so far as related to the second breach of the first count, and the third count, for money over and

beyond the sum of 9*l.* 14*s.* in the said plea admitted to be due as in the declaration mentioned.

The defendant pleaded *nunquam indebitatus* to the new-assignment, and issue was joined thereon.

By the particulars of demand the plaintiffs claimed

"The sum of 218*l.* due under the document dated the 22d of May, 1861, set out in the declaration, and purporting to be signed by the defendant . . . . . 218 0 0

"Goods supplied under the document of the same date set out in the plaintiff's declaration, between the 22d of May, 1861, and the 1st of October, 1861 . . . . . 23 2 11

£241 2 11"

The cause was tried before Blackburn, J., at the last Spring Assizes for the county of York. The facts which appeared in evidence were as follows:—The plaintiffs carried on the business of iron and \*267] \*brass-founders at Colne, in the county of Lancaster, two of them being the personal representatives of Mary Fox, by whom the business had been carried on down to the time of her death in 1862. The defendant was a grocer at Barnoldswick, in the west riding of the county of York, and was also the owner of a weaving shed in the course of erection, and the occupier of a cotton-mill which he sub-let, at Colne, near Barnoldswick.

Prior to the 22d of May, 1861, Mrs. Hill had furnished to certain persons carrying on the business of mechanical engineers at Skipton under the name of William Hanson & Sons, and they were at that time indebted to her for castings to the amount of 218*l.* 10*s.* 11*d.* These castings had been supplied to Messrs. Hanson for the purpose of enabling them to complete certain contracts which they had entered into for work to be done for the defendant at his shed and mill, and in reliance on their representations that the defendant was largely indebted to them upon those contracts. Being unable to obtain payment, Mrs. Hill declined to furnish Messrs. Hanson with any more castings, without security for the sum already due, and for any goods to be thereafter supplied. The parties accordingly met on the 22d of May, 1861, when the two agreements declared upon were drawn up and signed.

Mrs. Hill went on supplying castings to Hanson & Sons; and there was a conflict of evidence as to whether these were used for the purpose of the works being done for the defendant: but ultimately it was established to the satisfaction of the jury that the three under-mentioned parcels were furnished for the defendant's shed and mill:—

"July 27, 1861.	Engine castings . . . . .	£7 18 1
" "	Brass castings . . . . .	8 1 10
"Oct. 1, 1861.	" " . . . . .	9 14 0."

The last item was covered by the payment into court.

\*268] \*It was proved that work had been done by Hanson & Sons for the defendant at the shed to the value of about 1050*l.*, and at the mill to the approximate value of 40*l.*; and that there was something due from the defendant to the assignees of Hanson & Sons, who had become bankrupt: but it also appeared that the work was done under a written contract, which was not produced.

On the part of the plaintiffs it was insisted, that, having proved work done by Hanson & Sons for the defendant to the amount of 1000*l.* and upwards, they (the plaintiffs) were entitled to recover from him the 218*l.* mentioned in the first agreement; and, as to the second agreement, that, if the castings furnished subsequently to the 22d of May, 1861, were destined for the defendant, and actually came to the hands of Hanson & Sons, it was immaterial whether or not they were used in the defendant's shed.

For the defendant, it was submitted that the plaintiffs could not recover upon the first agreement without producing the agreement between Hanson & Sons and the defendant, and showing that work had been done (and remained unpaid for) since the date of the memorandum of the 22d of May, 1861, to that amount; and that there was no evidence to warrant the jury in finding that the castings delivered on the 27th of July (amounting to 10*l.* 19*s.* 11*d.*) were applied to the defendant's work.

The learned Judge ruled that there was no case as to the 218*l.*, the subject of the first memorandum. He thereupon directed a nonsuit, reserving leave to the plaintiffs to move to enter a verdict for the 10*l.* 19*s.* 11*d.*, subject to all the objections appearing on his notes and the documents,—the court to have power to draw inferences; and neither party to appeal without the leave of the court.

*\*Overend*, Q. C., in Easter Term last, obtained a rule nisi to set aside the nonsuit, and for a new trial, on the ground that, [\*269 at the close of the plaintiffs' case, there was evidence to go to the jury of the plaintiffs' right to recover on the first agreement; or on the ground of the misdirection of the judge in ruling that the plaintiffs could not recover on the first agreement without putting in evidence the contract between Messrs. Hanson & Sons and the defendant; or why a verdict should not be entered for the plaintiffs (pursuant to the leave reserved) for the sum of 10*l.* 19*s.* 11*d.*, in addition to the sum paid into court by the defendant, on the ground that there was sufficient evidence of the defendant's liability for the two items of 7*l.* 18*s.* 1*d.* and 3*l.* 1*s.* 10*d.* under the second agreement.(a)

*Digby Seymour*, Q. C., showed cause.—As to the first memorandum, in the absence of evidence of any work having been done by Hanson & Sons to the shed after the 22d of May, the defendant's promise did not attach,—the words "providing he has work done as security for the same," being evidently intended to apply prospectively, and not to work which had been already done and paid for: and this construction is fortified by the terms of the second agreement. And, unless the agreement under which the work was being done for the defendant by Hanson & Sons was produced, it was impossible to ascertain whether anything or what was due under it. [WILLES, J. —The obvious meaning of the memorandum, on the face of it, I conceive to be this,—I engage to pay the 218*l.*, provided I am at the end \*of the six months indebted to Hanson & Sons in so much for [\*270 work done by them at any time then preceding.] The whole object of the guarantee was that the work should proceed: and that would

(a) These two sums formed two of the items which composed the sum of 23*l.* 2*s.* 11*d.* mentioned in the particulars of demand, and were for castings delivered to Messrs. Hanson & Sons on the 27th of July, 1861, for work which was being done by them for the defendant.



be frustrated by holding the proviso to apply otherwise than to work to be done in future. Then, as to the second branch of the rule,—there was no evidence to show that the castings in respect of which it is now sought to enter the verdict were ever used or wanted for the defendant's shed: and the goods sent to the mill were covered by the 9*l*. 14*s*. paid into court. All that was proved as to those two items, was, that the castings were sent to Hanson & Sons, and they said they were wanted for the shed.

*Overend, Q. C., contra.*—The plaintiffs were improperly nonsuited: they were no parties to the contract between Hanson & Sons and the defendant, and could not be aware of its existence. [WILLIAMS, J.—The learned judge held that the amount of work done and its value could not be ascertained without having recourse to the contract under which Hanson & Sons were to do it,—in other words, that such proof was a condition precedent to the right of the plaintiffs to recover upon the first memorandum of guarantee.] The substance of that agreement was, that, if Mrs. Hill would stay her hand, and not sue Hanson & Sons for the 218*l*. then due to her, for six months from that time, the defendant would pay the debt, provided he had work done as security for the same. The evidence was, that work had been done exceeding the value of 1000*l*. There was no evidence of payment: and the plaintiffs had no notice of the existence of any contract. [BYLES, J.—For anything that appeared, the whole of the work done had been already paid for; or it might have been that the work was to be paid for two years hence.]

\*271] \*The question is, upon whom was the burthen of proof? [WILLIAMS, J.—You assume that this was a proviso, and therefore that the burthen of proof lay upon the defendant. But if, on the other hand, it was a condition, it was for the plaintiffs to show that work had been done to the amount mentioned.] The object evidently was, that Hanson & Sons' establishment should not be broken up during the six months which it was anticipated would be required for the completion of the works at the defendant's shed: and, in consideration of that forbearance, the defendant was to pay Hanson & Sons' debt, provided they had at any time done work at the defendant's shed to that amount. [WILLIAMS, J.—“As security for the same.” That is, if I have work done which will be a security to me for such payment.] The second memorandum relates to the work to be done thereafter. The words relied upon for the defendant were introduced by way of defeasance or restriction of the liability imposed upon him by the earlier part of the document, and therefore the burthen of proof lay on him. [WILLIAMS, J.—There was evidence that *some* work was done posterior to the date of the memorandum,—to a small amount, not at all commensurate to the plaintiffs' claim under the first count. If your argument be good, it would be equally so if no work at all had been done since the date of the agreement by Hanson & Sons for the defendant.] Whether the work was done before or after the date of the agreement, the defendant was bound to pay Mrs. Hill to the extent of 218*l*. The consideration was forbearance. “A proviso is properly the statement of something extrinsic of the subject-matter of a covenant, which shall go in discharge of that covenant by way of defeasance: an exception is a taking out of

the covenant some part of the subject-matter of it:" 1 Wms. Saund. 233 b, n. (d) to Thursby v. Plant. In \*Chappell v. Bray, 6 Hurlst. & N. 145, the plaintiff, part-owner of a ship, and who [\*272 acted as ship's husband, being authorized by the other part owners (of whom the defendant was one) to repair and lengthen the ship, gave verbal orders for the repairs, and entered into a written contract with a ship-builder for lengthening the ship. Afterwards, the plaintiff received a notice from the defendant that he would not be answerable for any alterations in the ship. The work was completed and the plaintiff paid for it, and, on telling the defendant the amount, he said that "the ship had better have been sold." The plaintiff having sued the defendant for his proportion of the money paid, it was held that he need not produce the written contract, since the work was done, the money paid under it, and the defendant, on being told the amount, did not deny his liability. [WILLES, J.—The decision in that case turned mainly upon the case of Slatterie v. Pooley, 6 M. & W. 664. At least three of the judges so put it. BYLES, J., referred to Dawson v. Wrench, 3 Exch. 359.]

WILLIAMS, J.—With respect to the claim made by the plaintiffs in the first count of the declaration, founded upon the guarantee of the 22d of May, 1861, I am of opinion that the conclusion the learned judge came to was right, and that no case is made out under which the plaintiffs could maintain that claim. The terms of the guarantee are these,—“May 22d, 1861. Mr. James Nuttall, of Barnoldswick, agrees to pay to Mary Hill, iron-founder, Colne, on W. Hanson & Sons' account, of Skipton, the sum of 218*l.*, being the amount owing to her by them, together with interest for the same, in six months from the above date, with interest up to this time, Nov. 22, 1861, *providing he has work done as security for the same.*” And this memorandum was signed by the defendant. The first question \*which [\*273 arises upon this guarantee, is, whether the concluding clause, “providing he has work done as security for the same,” is either part of the consideration or at all events a condition precedent to any liability on it, because the effect of my Brother Blackburn's ruling was to throw the burthen of proof on the plaintiffs. On the part of the plaintiffs, it has been insisted that that clause was merely in the nature of a defeasance, and therefore that the burthen of proof lay on the defendant. On the part of the plaintiffs, it was contended that the only consideration for the defendant's entering into the guarantee was, the implied undertaking on the part of Mrs. Hill not to sue Hanson & Sons for six months. But it does not follow that it was not also part of the consideration that the defendant was to have work done as a security for the money to be paid by him under the guarantee: in which case the burthen of proof would be cast upon the plaintiffs; and the only question would be whether the evidence sustained it. I am clearly of opinion that it was either a partial consideration or a condition precedent that work should be done. The circumstances under which the guarantee was given were these:—Hanson & Sons were under a contract to perform certain engineering work for the defendant, the execution of which required castings which it was Mrs. Hill's business to furnish. There was a debt of 218*l.* due to Mrs. Hill for castings which she had already supplied,

and she refused to go on unless her claim was satisfied, and pressed for payment. Hanson & Sons were unable to pay. If Mrs. Hill declined to furnish the castings, it was plain that the defendant would be much inconvenienced, inasmuch as his building would remain unfinished. The solution of the difficulty which the parties arrived at was in substance this:—To satisfy Mrs. Hill's claim, the defendant \*274] undertook to guarantee the \*payment. But it was necessary that he should have some security for the liability he thus incurred. The way in which that was arranged was this:—The time for payment of the debt due from Hanson & Sons to Mrs. Hill was to be extended six months; it being expected that at the end of that time the works in question would be completed, or at all events so far advanced that there would then be money due from the defendant to Hanson & Sons, which would form a security for the money he was contracting to pay to Mrs. Hill. In other words, that, instead of then paying Hanson & Sons any money which might have become due from him to them, the defendant should pay Mrs. Hill to the extent of the 218*l*. The defendant would thus have full security for any payment he might be called upon to make under the guarantee. A part of the agreement necessarily was, that the defendant was not to become liable unless he had work done as a security. If that were so, what the plaintiffs had to prove, was, that at the end of the six months the defendant was under a liability to her by reason of work done by Hanson & Sons under their contract with him for which money to the extent of 218*l*. was payable to them. The question is, whether the learned judge was right in holding that the evidence at the trial was not sufficient, without producing the contract between Hanson & Sons and the defendant. I am of opinion that he was right. The evidence given was, that work to the extent of 1050*l*. had been done under the contract prior to the date of the guarantee, but none since beyond what would be covered by the money paid into court. The learned judge ruled, that, unless the contract was put in, it was impossible to say that there was any legal evidence out of which the defendant's liability could arise; but that it must depend \*275] upon the terms of the \*instrument. I am clearly of opinion that the learned judge was right in so holding. So much for the first guarantee. Then it seems, that, as to the future supplies, Mrs. Hill was not content to get security for her existing debt, but required further security for future castings. Accordingly, the second document was given to provide for those. The terms of the second guarantee were these,—“Colne, May 22d, 1861. Mary Hill agrees to make and deliver castings required for Mr. Nuttall's shed at Barnoldswick, as usual, and Mr. James Nuttall to pay for the same in monthly payments on W. Hanson & Sons' account, of Skipton; to which agreement we the undersigned agree too.” And this was signed by Mrs. Hill, by one of the Hansons, and by the defendant. There was evidence that, in the way in which castings had been previously supplied by Mrs. Hill for Nuttall's shed, castings to the amount of 10*l*. 19*s*. 11*d*. beyond the 10*l*. 14*s*. paid into court, had been supplied by her to Hanson & Sons, and for the purpose of completing the work at the defendant's shed. It was not necessary that it should be proved that those castings had actually been forwarded

to the defendant's shed. The terms of the second memorandum were satisfied by proving that they were delivered to Hanson & Sons. To the extent, therefore, of 10*l.* 19*s.* 11*d.*, a verdict will be entered for the plaintiffs, pursuant to the leave reserved.

WILLES, J.—I am of the same opinion. With respect to the first guarantee, it seems to me that my Brother Blackburn put the correct construction upon it at the trial. The question turns entirely upon the proviso at the end of that document,—“providing he has work done as security for the same.” Now, the doing of work by Hanson & Sons for Nuttall could hardly be a security for a payment by the latter to \*Mrs. Hill in the ordinary sense. The true meaning [\*276 of the proviso evidently is, “provided Nuttall at that time owes Hanson & Sons so much for work done by them for him;” so that, in the event of an action being brought by them against him for the work so done, he would have a right to set off the money he had paid to Mrs. Hill on their account. It is not an ordinary guarantee; but an agreement by which Mrs. Hill is subrogated into the place of Messrs. Hanson & Sons,—to have all the rights of Hanson & Sons, and to be paid (to the extent of 218*l.*) what might be due from Nuttall to them. It is evident, therefore, that, when she seeks to enforce the agreement, she must show that the persons in whose place she stands would have had a claim to the extent to which she seeks to recover. To do this, she must produce the ordinary evidence. If Hanson & Sons had brought an action for the price of the work done, the first question would have been,—what is the nature of your claim? The answer to which would have been, that it arose upon a written contract: and the plaintiffs would have been nonsuited if they failed to produce the contract or to account for its non-production. The same result must follow here. According to all ordinary notions, a claim which depends upon a written contract cannot be enforced without producing the writing. To put a case as an illustration,—suppose an agreement between A. and B. by which A. promises to pay B. any debt which he may owe to C. If an action is brought by B. against A. upon that agreement, and it is proposed to prove that A. is indebted to C. upon an overdue promissory note, B. could not recover in that action without producing the promissory note. Nor is there any hardship in putting such a construction upon this contract. The argument urged by Mr. Rew was founded mainly upon the plaintiffs' supposed \*ignorance of the existence of a [\*277 written contract between Hanson & Sons and the defendant. It is impossible, however, to rest the decision of the case upon any speculation as to whether or not the plaintiffs knew that the work done by Hanson & Sons for the defendant was done under a written contract. The law provides ample means of getting rid of any inconvenience of that sort by the service of a subpoena duces tecum: and, after all due and reasonable means have been taken to procure the production of the contract, if any existed, it would have been competent to the plaintiffs to give parol evidence of its contents. It has been said that there is authority for holding that it was unnecessary to produce the written contract in question: and for this Chappell v. Bray, 6 Hurlst. & N. 145, was relied on. But, when that case comes to be examined, it appears that the decision turned not on the ground

that the non-production of the written contract, simpliciter, was no bar to the plaintiff's right to recover, but upon the ground that the defendant had made an admission which rendered it unnecessary for the plaintiff to put in the agreement at all. The question here is widely different from that. It is, whether it was competent to the plaintiffs to prove a liability on the part of the defendant under a written contract, without producing the contract or accounting for its absence. I will take the judgment of each of the learned judges, seriatim, for the purpose of showing that that case is no decision on the point now before the court. The Lord Chief Baron says: "The third objection is, that the contract ought to have been in evidence. I am not prepared to decide whether it ought or ought not, for on the present occasion it is unnecessary, because, when the work was done, and the defendant was told the amount, he made no complaint that the sum with which he was charged was \*not strictly correct, nor did he make any inquiry about it, but merely said that it would have been better to have sold the vessel. His conduct is evidence from which a jury might come to the conclusion that the claim was correct; and it is now too late for him to dispute it." With respect to *Bramwell, B.*, he expressly founds his judgment upon *Slatterie v. Pooley*, 6 M. & W. 664; for, he says,—“It was argued on the part of the defendant that his obligation was, to pay a proportion of that money for which he was liable under the contract, and, since the contract was in writing, it must be produced. But *Slatterie v. Pooley* established that the necessity of proving a written agreement may be superseded by an admission of the defendant.” Then comes Baron Channell, who observes upon this point,—“It is said that the order was given by a written agreement, which ought to have been produced. No doubt, its production would have been one mode, and the most convenient mode, of proving the plaintiff's claim: but I am not prepared to admit that it is the only mode. It was objected that no question as to the written agreement could be asked without producing it: but I think the agreement was not a necessary element in the plaintiff's case; for, there was proof that the work was done under it, the amount paid, and that it was not unreasonable: and there were circumstances from which the court, sitting as a jury, might infer that the defendant adopted the payment.” It is true that Baron Wilde's judgment gives some colour for the argument which has been urged here. He says,—“It appeared that the work was done and had been paid for, and, when the plaintiff told the defendant what it cost, he did not make any objection, but merely said ‘the vessel had better have been sold.’ If the question had arisen, whether independently of that \*conversation, it was necessary to put in the written agreement, I should not be prepared to hold that the plaintiff was bound to do so, seeing that there was evidence of an authority to enter into the agreement, and that it was executed.” But, when we read what follows, it is impossible to hold that to have been the deliberate opinion of the learned Baron; for, he adds,—“Upon that, however, it is not necessary to give an opinion, for the point does not arise.” No one member of the court, therefore, adopts or sanctions the notion that where the nature and extent of the defendant's liability is to be ascertained from the terms contained in a written contract,

the production of the contract can be dispensed with. It appears to me that the ruling of my Brother Blackburn was quite right. So far as to the first guarantee. With respect to the second, I need say no more than that I entirely agree with what has been said by my Brother Williams. The plaintiffs are entitled to have the verdict entered for them upon so much of the record as relates to the second agreement, for 10*l.* 19*s.* 11*d.*

BYLES, J.—I am of the same opinion. Mr. Overend laid great stress upon the form of the stipulation at the end of the first guarantee, "providing he has work done as security for the same," which he insisted amounted to a proviso, and therefore cast the burthen of proof upon the defendant. I doubt, however, whether the doctrine as to a proviso which applies in the case of a covenant under seal, has any application to contracts of this nature. I entirely agree with all that has fallen from my Brother Williams. I think that the having work done as a security was a condition precedent, and that there is good reason also for holding it to be part of the consideration for the defendant's promise, though it is found at the end of the document. I also \*agree, that, as Mrs. Hill was to have the benefit of what might be due from the defendant under his contract with Han- [\*280 son & Sons, she put herself in the place of Hanson & Sons; and, as they could not have sued the defendant upon that contract without producing it, neither could she or her representatives. As to the second memorandum, I also agree that the delivery of the castings to Hanson & Sons was a compliance with that agreement, and that there was evidence to go to the jury that castings were delivered under that agreement to the amount of 10*l.* 19*s.* 11*d.* beyond the amount paid into court.

KEATING, J., concurring,

Rule absolute accordingly.

### EDMONDSON *v.* NUTTALL. *June 17.*

1. In an action for the conversion of goods of which the plaintiff has the immediate right of possession, the true measure of damages is the full value of the goods at the time of the conversion.

2. The plaintiff had certain looms in the defendant's mill, and demanded possession of them, the defendant having no right to detain them. The defendant, however, having obtained a judgment against the plaintiff in the county court, in respect of which he would be entitled to issue execution against him on the next day, refused to deliver them up: and the looms were taken in execution on the following morning, and sold. In an action for this wrongful conversion,—Held, that the liability of the looms to the county court process, and the fact that by the wrongful seizure the plaintiff's debt was (apparently) satisfied, were not circumstances which the jury could take into consideration in estimating the damages.

THIS was an action brought by the plaintiff, a weaver, against the defendant, the owner of a mill at Coates, in the county of Lincoln, to recover damages for the breach of an agreement to provide power for the working of the plaintiff's looms. There was also a count for the conversion by the defendant of seven looms belonging to the plaintiff. To this latter count,—to which alone it is necessary to advert,—the defendant pleaded not guilty and not possessed.

The cause was tried before Blackburn, J., at the \*last Spring [\*281 Assizes for the county of York, when the following facts

appeared in evidence:—In July, 1860, the plaintiff agreed with the defendant for standing and power for twelve looms in the defendant's mill, for which he was to pay 9*d.* per week for each loom.<sup>(a)</sup> After the looms had been at work for about two years, the plaintiff being in arrear with his weekly payments, and being unable to pay, it was agreed that the defendant should take five of the looms in satisfaction. The plaintiff becoming again in arrear for the standing of his remaining looms, the defendant sued him in the county court, and on Friday the 29th of January, 1864, obtained judgment against him for 28*l.* debt, and 11*l.* 15*s.* costs; and the judge made an order on the plaintiff to pay these sums on the following Monday.

On Saturday the 30th, the plaintiff went to the mill for the purpose of removing his looms. The defendant did not then refuse to allow him to take them away, but desired him to come on the following Monday. On the Monday, the plaintiff made a formal demand of the looms, and the defendant said he could not have them then, as he (the defendant) was going out: and on Tuesday the looms were seized (and subsequently sold for 24*l.* 17*s.*) under an execution from the county court at the defendant's suit. The writ in this action was issued on the same day.

The jury negatived the plaintiff's claim in respect of the breach of the agreement: and the learned judge reported that he was not dissatisfied with the verdict.

As to the count for the conversion, the learned judge told the jury that there was evidence of a conversion of the looms on the Monday, \*282] which he would leave to \*them; but that, the goods detained being lawfully seized on the Tuesday, and the plaintiff having had the benefit of the proceeds in reduction of his debt, they *might* take that into account in estimating the damages. He also asked them to say what damages they found for the conversion, if in point of law they were bound to give the value of the looms, without reference to the county court proceedings.

The jury returned a verdict for the plaintiff on the trover count, damages  $\frac{1}{2}$ *d.*; and they found the value of the looms to be 35*l.*

The learned judge thereupon reserved leave to the plaintiff to move to increase the damages to 35*l.* if the court should be of opinion that he ought to have directed the jury to find for the value of the looms seized,—neither party to appeal without the leave of the court.

*Overend*, Q. C., accordingly, in Easter Term last, obtained a rule nisi to increase the verdict to 35*l.*, pursuant to the leave reserved, on the ground that the plaintiff was entitled to recover the value of the looms at the time of the conversion, and on the ground that the judge misdirected the jury in telling them that they might take into consideration the probability of the looms being taken in execution.

*Digby Seymour*, Q. C., now showed cause.—The direction of the learned judge was perfectly correct. At the time this action was brought, the goods were actually in the custody of the law. [WILLES, J.—The defendant has possession of the goods on Monday, and he refuses to give them up, hoping that he will have an execution upon them on the Tuesday. The single question is, whether that reduces

(a) See *Hancock v. Austin*, 14 C. B. N. S. 634 (E. C. L. R. vol. 108), where it was held that these weekly payments could not be distrained for as "rent."

the plaintiff's claim in respect of the wrongful conversion on Monday to \*nominal damages.] If the plaintiff had succeeded in obtaining the looms on the Monday, the defendant might have seized them on the following day; and therefore the plaintiff has really lost nothing by the conversion. In *Brierly v. Kendall*, 17 Q. B. 937 (E. C. L. R. vol. 79), by indenture of sale, A. assigned all his household goods, &c., to secure a debt due from him to the assignees, subject to a proviso that the deed should become void upon payment of the said sum on a certain day, or on some earlier day to be appointed by the assignees by a notice in writing, to be served on A. twenty-four hours before the day of payment so appointed: interest to be paid in the meantime. It was also agreed by the deed, that, after default made in payment, contrary to the said proviso, it should be lawful for the assignees to enter and take possession of the goods, and to sell them, and reimburse themselves out of the proceeds, accounting to A. for any surplus; and that, until such default, it should be lawful for A. to hold, use, and possess the said goods without hindrance from the assignees. The assignees served A. with a notice to pay on a day earlier than that named in the deed, and afterwards entered and took, and sold the goods assigned; but the notice was bad, having been served less than twenty-four hours before the day of payment appointed by the assignees. It was held, that A. had under the deed the right of possession of the goods, defeasible only by default in payment after due notice, and that he might therefore sue the assignees in trespass for having wrongfully entered and sold; but that, in such action, the measure of damages should be, not the value of the goods, but the value of the plaintiff's interest in them at the time of the trespass. So, here, the proper measure of damages was, the value of the plaintiff's interest in the looms at the time of the conversion. [WILLIAMS, J.—Which was \*851. In the case cited, the plaintiff had a partial and limited interest in the goods at the time of the seizure. Here, the plaintiff was the absolute owner of the looms at the time of their conversion.] The value of that interest was a question for the jury. They thought that the execution pending was so certain that  $\frac{1}{2}d.$  covered the value. The principle laid down by this court in *Johnson v. Stear*, 15 C. B. N. S. 330 (E. C. L. R. vol. 109), is precisely applicable. There, A. deposited a dock-warrant for certain goods with B. as a security for a loan to be repaid on a certain day, it being agreed that in default of payment B. should be at liberty to dispose of the pledge. A. became bankrupt, and B., *before the day of payment*, entered into an absolute contract for the sale of the goods, and *on the day named* handed over the dock-warrant to the vendee, who took actual possession of the goods on the following day. It was held that this was a wrongful conversion by B. of the goods of A.; and the majority of the court (Williams, J., dissenting) held that the proper measure of damages was, not the full value of the goods, but the actual damage incurred by A. by the premature sale, which,—seeing that he had no intention to repay the loan,—was merely nominal. Erle, C. J., in delivering the judgment of the majority, there says: "It is clear that the actual damage is merely nominal. The defendant by mistake delivered one of the dock-warrants a few hours only before the sale and delivery by him



would have been lawful; and by such premature delivery the plaintiff did not lose anything, as he had no intention to redeem the pledge by paying the loan. If the plaintiff's action had been for breach of contract in not keeping the pledge till the given day, he would have been entitled to be compensated for the loss he had really sustained; and that would be a nominal sum only. The plaintiff's action here \*285] is in name for the \*wrongful conversion: but, in substance, it is the same cause of action; and the change of the form of pleading ought not to affect the amount of compensation to be paid. There is authority for holding, that, in measuring the damages to be paid to the pawnor by the pawnee for a wrongful conversion of the pledge, the interest of the pawnee in the pledge ought to be taken into the account. On this principle the damages were measured in *Chinery v. Viall*, 5 Hurlst. & N. 288. There, the defendant had sold sheep to the plaintiff, and, because there was delay in the payment of the price by the plaintiff, the defendant resold the sheep. For this wrong the court held that trover lay, and that the plaintiff was entitled to recover damages; but they also held, that, in measuring the amount of those damages, although the plaintiff was entitled to be indemnified against any loss he had really sustained by the resale, yet the defendant, as an unpaid vendor, had an interest in the sheep against the vendee under the contract of sale, and might deduct the price due to himself from the plaintiff from the value of the sheep at the time of the conversion." [WILLES, J.—Suppose the looms had been destroyed by an accidental fire on the Monday night, who would have borne the loss?] The plaintiff, doubtless. The jury might fairly infer here that the plaintiff had no intention to pay the judgment-debt. [BYLES, J.—The consequence of entering a verdict for the plaintiff for the full value now would be, to pass the property in the looms to the defendant: and thus he will have taken in execution \*286] his own goods.(a)] In *Chinery v. Viall*, Bramwell, B., \*says: "The cases on this subject are well put together in *Mayne on Damages* 215, and show that in this action it is not an absolute rule of law that the value of the goods is to be taken as the measure of damage. There are several cases which may be mentioned as illustrative of this. For instance, where a defendant, after having been guilty of an act of conversion, delivers the goods back to the plaintiff, the actual damage sustained, and not the value, is the measure of damages. So, where a man has temporary possession of a chattel, the ownership being in another, the bailee no doubt may maintain an action; but only for the real damage sustained by him in the deprivation of the possession. Other cases might be cited to show that there is no such absolute rule of law as to the damages in trover as that suggested." [WILLIAMS, J.—Suppose a man were charged with the conversion of fowls by eating them, would it be any answer to the claim for full damages, to say, that, if he had not taken them, perad-

(a) "By a former (?) recovery in trover, and payment of the damages, the plaintiff's right of property is barred, and the property vests in the defendant in that action: see *Adams v. Broughton*, 2 Stra. 1078, *Andrews* 18, and *Jenkins*, 4th Cent. ca. 88, where it is laid down,—'A., in trespass against B. for taking a horse, recovers damages; by this recovery, and execution done thereon, the property in the horse is vested in B. 'Solutio pretii emptiois loco habetur.' Per *Tindal*, C. J., in *Cooper v. Shepherd*, 3 C. B. 272 (E. C. L. R. vol. 54).

venture a fox would have come and eaten them?"] The danger of seizure in the case supposed would not be so imminent as it was here. In *Cameron v. Wynch*, 2 Car. & K. 264 (E. C. L. R. vol. 61), in an action of trover, where the plaintiff had been endeavouring to baffle his creditors by a merely ostensible transfer of the goods to another, and where they were seized upon premises in which the plaintiff's tenancy had expired, it was held,—first, that there was a sufficient possession as against a wrongdoer, without regard to the question of ownership,—and, secondly, that the measure of damages was the value of the plaintiff's real and bonâ fide interest in the goods, and not the full value. These \*authorities clearly show that the [\*287 question is one of interest, not of title. If the jury were justified in coming to the conclusion, from all the facts before them, that the plaintiff could not have got his looms away so as to have escaped the impending execution, the learned judge was right in telling them that they might take that into consideration in estimating the damages.

*Overend*, Q. C., and *Rew*, in support of the rule.—There was nothing to warrant the jury in awarding the plaintiff less than the full value of the goods, for their wrongful conversion. *Attack v. Bramwell*, 9 Jurist N. S. 892, is almost identical with the present case. There, the landlord, who had distrained the goods of his tenant for rent in such a manner as to render himself a trespasser ab initio, was made to pay in the shape of damages the full value of the property seized. The same arguments were urged there which have been urged upon the present occasion, but without avail. Cockburn, C. J., said: "I think it must be taken, that, where a man, under colour of legal authority, as in the case of a distress for rent, does that which makes him a trespasser ab initio, he is in the same position as a total stranger acting without authority. The defendant, then, being in the position of a stranger, and having broken into the plaintiff's house and seized his goods, it certainly does not lie in his mouth to say he has applied the goods for the benefit of the party bringing an action for the trespass." Crompton, J., said: "I can regard the defendant in no other light than as a trespasser without justification. The goods have been lost to the plaintiff, and, by the ordinary rule, nothing in such case can be taken to reduce their value,—that is to say, the measure of damages must be the full value of the goods." And, adverting to the case, which had been suggested in argument, of \*the goods [\*288 converted being in the hands of the defendant subject to a lien, he adds: "There, it is clear, all that is recoverable is, the value of the goods detained, minus the debt the foundation of the lien: here, however, there is no lien in existence, the defendant being, under the circumstances, nothing more than a stranger, who had no right whatever to interfere with the goods. The only ground upon which it is said that the plaintiff's interest was less than the actual value of the goods, is, that the goods having been seized and sold, the rent was satisfied: but this is too remote; and *Keen v. Priest*, 4 H. & N. 236, is an authority to show the fallacy of such a proposition. A man who enters the house of another, and wrongfully seizes his goods, has no right to avail himself of such a defence: and I think the case I put in the course of the argument, of a landlord entering upon the

premises of his tenant, and distraining for rent not accrued due, and afterwards attempting to palliate the act by saying, 'I put the proceeds of this unjustifiable proceeding against the rent when it becomes due,' is entirely applicable to the present case." And Blackburn, J., who had directed the jury there substantially as he did here, intimated that he had no doubt but that he should have told the jury that the proper measure of damages was the value of the goods seized. Here, the defendant had no lien, nor any interest whatever in the goods, at the time of the seizure. [BYLES, J.—Do you contend, that, if the goods were converted for a minute, and then given back to the owner, he would be entitled to recover the full value as damages for the conversion?] No. [BYLES, J.—The contingency of the goods being taken under the county-court execution was converted into a certainty before the commencement of the action. WILLES, J.—A return of the goods after action brought goes in mitigation of damages: see *\*Moon v. Raphael*, 2 N. C. 310 (E. C. L. R. vol. \*289) 29.(a)] The probability of his having an execution next day was no justification for the fraudulent act of the defendant, and ought not to be taken into account. The facts which happened subsequently have nothing to do with the value of the plaintiff's goods at the time of the conversion. If *Keen v. Priest*, 4 Hurlst. & N. 236, be good law, the direction of the learned judge here was clearly wrong. There, the owner of sheep seized and sold under a distress for rent which was unlawful, because there were other goods on the premises belonging to him which might have been distrained for the same rent, was held to be entitled to recover from the distrainor, not merely nominal damages, but the full value of the sheep so seized. "It is a general rule," said Martin, B., "that, if a man does an illegal act, he is responsible for the consequences of it. It is no answer to say that the defendant might have seized other goods. The plaintiff's sheep having been sold, he is entitled to recover their value." So, here, it is no answer for the defendant to say that he might have seized these goods upon another day. And Bramwell, B., contents himself with saying, that, "in trespass for taking goods, the measure of damages is, the value of the goods." In *Johnson v. Stear*, 15 C. B. N. S. 330 (E. C. L. R. vol. 109), Williams, J., differed from the rest of the court. [WILLIAMS, J.—No doubt, I was wrong.] It is submitted not.(b) \*290] The whole court agreed, that, in a case like this, the \*measure of damage was the value of the goods to the plaintiff at the time of the conversion. [WILLES, J.—Suppose the looms had been delivered up on the Monday and taken to the plaintiff's house, and the bailiff had broken open the outer door and taken the looms away and sold them, could the now plaintiff have recovered, either against the bailiff, or against the execution-creditor, if party to the trespass, the full value of the looms? The goods would have been equally got at there by means of a wrongful act.] In the case put, the plaintiff, it

(a) And see the authorities cited in *Williams v. Archer*, 5 C. B. 318 (E. C. L. R. vol. 57).

(b) The learned judge puts the right of the plaintiff there to recover the full value of the goods converted, upon the technical ground that, "the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner against all the world." And see *Pigot v. Cubley*, 15 C. B. N. S. 701 (E. C. L. R. vol. 109).

is submitted, would be entitled to recover the full value, or at all events the difference between the real value and the sum which the bailiff sold the goods for. As between the two parties, the writ may have bound the goods. [WILLES, J.—That is the answer. The act of entering would be unlawful,—so held from Semayne's Case, 5 Rep. 91 a., Cro. Eliz. 908, Moor 668, downwards; but the execution would be good.(a) The true solution may be, that there was a lien by force of the writ. It is an apparent exception from the rule that no man shall take advantage of his own wrong.] In the cases where the distress was held to be unlawful, though the full value was recovered, the rent remained undischarged. [WILLIAMS, J.—Apparently the judgment was satisfied here; yet the execution-creditor has taken his own goods.] That might have been set right by an application to the county court. [BYLES, J.—In *Harvey v. Pocock*, 11 M. & W. 740, it was held, that, where a landlord distrains for rent, amongst other things, goods which are not distrainable in law (as, looms in work, there being sufficient without them to satisfy the rent), and the tenant pays the amount of the rent and the costs of distress, upon which the distress is withdrawn altogether, the \*tenant is entitled, in an action of trespass, to recover only the actual damage sustained by the taking of those particular goods, and not the whole amount paid by him,—the distrainer, in such a case, being a trespasser ab initio only as to the goods which were not distrainable. Does the form of action make any difference?] It is submitted not. [WILLIAMS, J.—Until the case of *Fouldes v. Willoughby*, 8 M. & W. 540, it was always said that where trespass would lie trover would. One of the reasons for denying that proposition is, that, in trover, the jury must give the full value.] In that case, the thing complained of, was, a wrongful interference with the plaintiff's horses, without any claim of property, or conversion of them to the defendant's use. It was clearly a misdirection on the part of the learned judge to tell the jury that they might take the county-court process into their consideration in estimating the amount of damages. As a matter of law, the defendant had no right to interfere with the plaintiff's goods; and, having done so, he must, as Erle, C. J., says, in *Hancock v. Austin*, 14 C. B. N. S. 689 (E. C. L. R. vol. 108), pay the value of them.

WILLIAMS, J.—I am of opinion that the rule must be made absolute to enter a verdict for the plaintiff for 35*l*. My Brother Blackburn reserved leave to the plaintiff to move to that effect, if the court should be of opinion that he ought to have directed the jury to find for the value of the looms seized. I am of opinion that he ought to have done so. The substance of the transaction was this:—The defendant committed a wrong by seizing goods of the plaintiff under circumstances which the jury found to be a conversion of them to his own use. It was clearly established that the goods were wrongfully seized by the defendant. But it is contended that the rule, which is \*beyond all question a *prima facie* rule, that for an act of this sort the plaintiff is entitled to recover as damages the full [\*292 value of the goods seized, ought not to prevail here, because the

(a) See *Percival v. Stamp*, 9 Exch. 167. And see the notes to *Semayne's Case* in 1 Smith's *Leading Cases*, 5th edit. 96.

defendant shows mitigating circumstances, viz., that, after he had been guilty of wrongfully converting the goods of the plaintiff, he caused them to be applied so as to be apparently a satisfaction of a judgment-debt due to himself. In other words, the defendant insists, that, because with the proceeds of the plaintiff's goods which he so wrongfully converted, he has satisfied his own debt, that fact must be taken into consideration by the jury in ascertaining what measure of damages the plaintiff ought to receive for the wrong done to him. I utterly decline to acknowledge the soundness of that argument. There is nothing unlawful in a man's withdrawing his goods for the purpose of avoiding an impending execution. He may choose to apply them in satisfaction of the claim of another creditor; and this he has a perfect right by law to do, apart from any question arising upon the bankrupt or insolvency law. It is clearly no ground for mitigation of damages for the defendant to say that he has chosen to detain the plaintiff's goods in order that he may seize them and apply the proceeds in satisfaction of his own debt. If he might do this, what is there to prevent his doing so for the purpose of satisfying his friend's execution which he knows to be outstanding? The case has been likened to that of the redelivery of the thing converted, which is allowed to go in mitigation of damages; as in *The Countess of Rutland's Case*, cited in *Rolle's Abridgment, Action sur Case* (L.) where it is said,—“If a man take my horse and ride him, and then redeliver him to me, still I may have an action against him; for, it is a conversion, and the redelivery is no bar to the action, and only goes in \*mitigation of damages.” So, in *Moon v. Raphael*, 2 N. C. \*293] 310 (E. C. L. R. vol. 29), where the defendant, a sheriff, who held goods taken in execution, delivered them to the plaintiffs, assignees of a bankrupt, after an action of trover had been commenced by them, and the plaintiffs accepted them without condition,—it was held that they could not recover in the action more than nominal damages; at all events, not without alleging special damage in the declaration. The only other case in the books which I am aware of, in which a redelivery after action brought has been allowed to go in mitigation of damages, is that of *Williams v. Archer*, 5 C. B. 318 (E. C. L. R. vol. 57). There, in detinue for railway-scrip which had been delivered up to the plaintiff, after action brought, under a judge's order, it was held by the Exchequer Chamber, that, inasmuch as the scrip had already been redelivered, the verdict and judgment had been properly confined to an assessment of damages for the detention; by analogy to the case of the redelivery of charters (17 E. 3, fo. 45 b, pl. 1), being rendered impossible by reason of their having been burnt. Here, however, the goods were never redelivered to the plaintiff. He never had power to do as he pleased with them. There is no ground whatever for saying that the defendant ever restored to the plaintiff the control over his goods. Contrary to the plaintiff's wishes, he devoted them to the payment of his own debt. Then comes the main argument. It was said, that, if the plaintiff were allowed to recover by way of damages in this action the full value of the goods, the consequence will be that the goods will be by virtue of the judgment and execution regarded as having been the property of the defendant from the time of the conversion.

The obvious answer to that is, that, in the result, the seizure of these goods will not have operated in satisfaction of so much of the debt due to the \*defendant upon his judgment in the county court. [\*294 The execution, having been satisfied so far out of what turn out to have been the execution-creditor's own goods, is no satisfaction at all, and the now defendant may go to the county court and obtain leave to issue fresh process. There is no ground for urging what has been done in mitigation of damages: and therefore the rule must be made absolute.

WILLES, J.—I am of the same opinion. The measure of damages for the conversion of goods is *prima facie* their value. The direction, therefore, of my Brother Blackburn to the jury in this case was wrong, unless there were circumstances to make some other principle applicable. Such circumstances may exist either where the plaintiff has only a limited interest in the goods at the time of the conversion, or where the defendant has a lien upon them, or, as in *Brierly v. Kendall*, where the plaintiff had a defeasible right to the possession of them. There is nothing to make this case an exception from the general rule, that the plaintiff is entitled to recover all he has lost by the defendant's wrongful act. Then, there is the case in which the goods wrongfully seized have been afterwards returned. The cases of *Fouldes v. Willoughby*, 8 M. & W. 540, and *Harvey v. Pocock*, 11 M. & W. 740, afford a familiar illustration of the rule. The circumstances I have referred to have from very early times been considered admissible in mitigation of damages, because the plaintiff has had part satisfaction for the wrong. If the goods have been restored, and the plaintiff has consented to take them back in discharge of the claim, that might perhaps be pleaded by way of accord and satisfaction: if not, it would go in reduction of the amount of damages to which the plaintiff would be entitled for the wrongful conversion. There \*is also another [\*295 case in which a mitigation of damages is allowed upon a very peculiar ground,—the case of one who, as executor *de son tort*, has dealt with the goods of the deceased in a due course of administration, and relies on that as an answer to an action brought against him by the real executor appointed under the will. There, the character of the act of wrong is determined at the time it is done. The law, however, regards it with so much favour, that, if the real executor would have done the same, no recovery is allowed against the executor *de son tort* in respect of damages for that part of the estate which has been so applied. In all these cases, the damages are allowed to be mitigated, either in respect of the interest of the plaintiff in the goods being less, or of his having already received a partial satisfaction of the damages, or of the act being an act having a rightful character in respect of the persons towards whom it is done and in whose favour it operates at the time. But that principle cannot apply here, where the plaintiff had an unqualified right at the time to do as he liked with the goods, and the act of the defendant was wrongful and without any justification. I cannot help thinking that we should be violating the rule of law which prohibits a man from taking advantage of his own wrong, if we were to hold that the defendant's execution was to have a greater advantage or be more beneficial to him by reason of his wrongful act in seizing and detaining the plaintiff's goods

for the purpose of making them amenable thereto. There clearly was nothing like a redelivery of the goods to the plaintiff here. So long as law shall endure, parties cannot be allowed to be judges or bailiffs in their own cases. In all cases save the exceptional one of a distress, the final process of the law is to be executed by the officers of the law. A person who has in violation of the law taken \*296] upon himself to seize goods which he has no right to, ought \*not to be allowed to come and ask for any favour or encouragement,—which we should in effect be allowing if we held that the subsequent seizure under the county-court process could qualify the defendant's wrongful act of detaining the goods on the previous day. I observe that my Brother Blackburn did not express any opinion on the point of law at the trial. He left the matter to the jury, not with a direction such as he would have given them in the case of a plaintiff having but a limited interest in the goods, or of a defendant having a lien, or in the case of a redelivery: but he simply told them that they *might* take the fact of the plaintiff having the benefit of the proceeds in reduction of his debt into account in estimating the damages. He evidently felt the difficulty of stating that as a proposition of law. To hold that the defendant is entitled to have the fact of the goods being liable to the county-court process taken into consideration in estimating the damages in this action, would be giving him a greater advantage than the law would give him in the ordinary case of a lien, or in the other cases which I have put. Considering what violence might ensue if a creditor were allowed, for the purpose of securing his debt, to resort to an act unlawful at the time, and to justify it afterwards by something which did not then exist, I think we are not warranted in allowing the inchoate right of the defendant to have execution against the goods in question to operate in reduction of the damages which the plaintiff is entitled to for the wrongful seizure. There is a case where this doctrine was attempted to be carried to a very great length. I allude to the case of *Gillard v. Brittan*, 8 M. & W. 575. There, the seller of goods which had not been paid for, retook them by violence from the buyer, and, in an action brought against him by the buyer for the trespass, insisted that the jury might, in estimating \*297] the damages to which the plaintiff was \*entitled, allow the value of the goods so unpaid for in mitigation. But the Court of Exchequer took a different view of the matter, and held, for reasons which are equally applicable here, that the defendant must pay by way of damages for his unlawful act the full value of the goods seized. For these reasons, I am of opinion that the rule must be made absolute to increase the damages to 85*l.*, the value contingently assessed by the jury.

BYLES, J.—I am of the same opinion, though I must confess I at first entertained considerable doubts. He who wrongfully converts goods of another is *primâ facie* liable in damages to the full value of the goods converted; and it is no answer to say that the wrongful act of the defendant has operated to relieve the plaintiff from a debt. As, if a man were to convert a bag of money belonging to A., it would be no answer for him to say that with the contents he had satisfied a debt due from A. to B.: the full value of the money converted would still be the true measure of damages for the defendant's wrongful act. The present case is very distinguishable from the case of goods retaken,

or of goods returned and the restoration accepted in satisfaction. Another difficulty which occurred to me in the course of the argument was this,—The debt is paid, and the party has lost his goods,—but he gets 35*l.* by the transaction. That, however, I apprehend, is not so. The effect of the judgment and execution in this action, is, that the property is changed. The result is, that probably the defendant may now go to the county court and get new process upon his judgment there. I am clearly of opinion that the jury ought to have been directed to find for the plaintiff for the full value of the looms seized.

KEATING, J., had gone to Chambers.

Rule discharged.

\*HEYWORTH and Others v. KNIGHT. June 4. [\*298

1. The defendant authorized his brokers by letter to buy for him a cargo of bone-ash at a certain price per ton,—“on a basis of 70 per cent. mean of two London chemists: usual London terms, viz., cash in twenty-eight days, less 2½ per cent.” This offer was communicated by the defendant’s brokers to the sellers’ brokers by letter as follows,—“We can take the cargo at, &c., cash in twenty-eight days from last day of landing, less 2½ per cent.: to be analysed by two London chemists.” The sellers accepted the offer, and sent a bought-note to the buyer’s brokers, describing the terms of payment thus,—“Payment, cash before delivery, allowing a discount of 2½ per cent. equal to cash in Liverpool with twenty-eight days from last day of landing:”—Held, that there was no substantial difference between the offer and the acceptance, and consequently that there was a binding contract between the parties.

2. Where a complete contract (through brokers) for the sale of goods is to be gathered from a written offer on the one side and a written acceptance on the other, such contract is not the less binding on the buyer because bought and sold-notes are subsequently exchanged between the brokers, containing terms not warranted by the authority given to the buyer’s broker,—at all events, in the absence of evidence of a custom in the particular trade to contract by bought and sold-notes, or of a distinct understanding between the parties to that effect.

3. Remarks upon *Cowie v. Remfry*, 5 Moore’s P. C. 232.

THIS was an action by the sellers against the buyer, for refusing to receive a cargo of bone-ash, alleged to have been sold by the plaintiffs to the defendant through their respective brokers.

The declaration stated that the plaintiffs bargained and sold to the defendant, and the defendant bought from the plaintiffs, certain goods, that is to say, 284 tons of ash, at 5*l.*, on a basis of 70 per cent. mean of two London chemists, and 5 tons of bones and 25 tons of piths at 5*l.* 5*s.* per ton, upon usual London terms, viz. payment by cash in twenty-eight days, less 2*l.* 10*s.* per cent. discount: Averment, that all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiffs to maintain the action and to have the said goods accepted by the defendant: Breach, that the defendant did not accept the said goods from the plaintiffs or pay them the said prices for the same; whereby the plaintiffs incurred expenses in keeping the said goods and reselling the same, and also incurred a loss upon such resale.

The defendant pleaded a denial of the contract as alleged; whereupon issue was joined.

The cause was tried before Willes, J., at the last Spring Assizes at Liverpool. The question was whether \*there had been any [\*299 contract made in accordance with the authority given by the defendant to his brokers; and it depended upon the construction to be put upon certain letters, telegrams, and bought and sold-notes.



The correspondence commenced with a letter from the brokers to the defendant, dated the 5th of November, 1863, as follows:—

“Liverpool, 5th November, 1863.

“Henry Knight, Esq., London.

“Dear Sir,—We are offered a small cargo now at sea about sixty days, as follows: about 284 tons ash,

“5*l.* on 70 per cent.

“5 tons bones } 5*l.* 5*s.*

“25 tons piths }

“Let us know if it will suit, and your extreme limits, and we will do the best we can for you. “JOHN BECKWITH, JUN. & Co.”

On the following day the defendant wrote to Beckwith & Co., his brokers, the letter which was relied upon as the authority, and which was as follows:—

“London, 6th November, 1863.

“Messrs. John Beckwith, jun., & Co.

“Dear Sirs,—I had your favour of yesterday, and note contents. I would take the cargo referred to,—ash at 100*s.* on a basis of 70 per cent. *mean of two London chemists*, and bones and piths at 105*s.* (though it is 10*s.* too dear for piths), *usual London terms*, viz. *cash in 28 days, less 2½ per cent.* I have no doubt you will be able to carry it through on these terms. I always buy ‘28 days,’ and declined a cargo the other day at 100*s.* because these terms were not agreed to. This offer is made, presuming the cargo can go to any safe port, and that your brokerage is 2½ per cent. “HENRY KNIGHT.”

\*300] On the 7th of November, Beckwith & Co. \*telegraphed to the defendant, as follows:—“Price will be accepted for cargo, but terms must be *cash in fourteen days, usual discount. Liverpool conditions.* Telegraph.”

The defendant being from home, no answer was returned to this telegram; and on the same day Beckwith & Co. wrote to Martin & Co., the plaintiffs’ brokers, as follows:—

“Liverpool, 7th November, 1863, 3 p. m.

“Messrs. G. F. Martin & Co.

“Dear Sirs,—Our friends have not answered our telegram; therefore we may reasonably presume they will not take the cargo on your terms; more especially as they say in their letter,—‘We always buy at 28 days, and declined a cargo the other day at 5*l.* because these terms were not agreed to.’

“We can take the cargo at 5*l.* per ton 70 per cent. ash, and 5*l.* 5*s.* bones and piths, *cash in twenty-eight days from last day of landing, less 2½ per cent.* To be analyzed by two London chemists. To go to any safe out port. An early answer will oblige.

“JOHN BECKWITH, JUN. & Co.”

On the same day the plaintiffs’ brokers sent to the defendant’s brokers the following memorandum:—

“Vasco di Gama.

“We accept your offer: payment 28 days. Please confirm.”

To this the defendant’s brokers replied on the same day,—

“We confirm your acceptance of our offer for the cargo bones and ash per Vasco di Gama. Contract, we presume, in due course: say, on Monday.”

The defendant's brokers on the same 7th of November wrote to the defendant, as follows:—

“Liverpool, 7th November, 1863. [\*301

“Henry Knight, Esq.

“Dear Sir,—We telegraphed to you to the effect that the importer of the cargo bones and ash would accept the price but not the conditions offered in your favour of yesterday's date. However, late this afternoon we induced his brokers to close; so have now the pleasure of advising the purchase on your own terms, viz. 5*l.* per ton on 70 per cent. ash, and 5*l.* 5*s.* for bones and piths. Cash in 28 days from last day of landing, less 2½ per cent. discount. *Ash to be analyzed by two London chemists.* The contract shall be forwarded by Monday's post: being mail-day, and very late, it is not likely to be sent in. [Some remarks followed about the amount of brokerage.] Name of vessel, Vasco di Gama. Can go to any safe port.

“JOHN BECKWITH, JUN. & Co.”

To this the defendant replied,—“I am in receipt of your favour. and note contents. I could have bought a week ago on the terms you mention, and therefore must decline to purchase *on Liverpool conditions.* I have refused offers on the same terms.” And on the 9th he sent his brokers the following telegram,—“I do not confirm till I see contract. Conditions must be those of a London contract. 2*s.* 6*d.* a ton allowed for weighing and port-charges.”

On the same day Beckwith & Co. sent the following telegram to the defendant,—“Accepted contract on Saturday according to definition in your letter of London terms.”

On the 9th of November, Beckwith & Co. wrote to Martin & Co. the plaintiffs' brokers, as follows:—

“Liverpool, 9th November, 1863.

“Messrs. G. F. Martin & Co.

“Dear Sirs,—The contract for cargo ash, &c., per \*Vasco di Gama appears to be all correct, except in regard to the clauses [\*302 referring to the analysis. We cannot ourselves say that our friends will assent to a third chemist being called in, should there be a difference of more than 3 per cent. between the two originally named; neither that they will agree to have the samples ground and passed through a 20-holed sieve. Such being the case, we must return the contract until we receive his reply, which no doubt will be perfectly satisfactory.

“JOHN BECKWITH, JUN. & Co.”

The sold-note, which, though dated the 7th of November, was not delivered to the defendant's brokers until the 9th, was as follows:—

“Liverpool, 7th November, 1863.

“Messrs. John Beckwith & Co.

“We have this day sold to you, per account of Messrs. Heyworth, Pearce & Balman, a cargo of about 280 tons ash, 5 tons bones, and 25 tons piths, more or less, expected to arrive per Vasco di Gama from River Plate, to discharge at any safe port in the United Kingdom, at 5*l.* per ton for bone-ash, on a basis of 70 per cent. of phosphate; the price to rise or fall as the ash may deviate from that standard; the bones and piths at 5*l.* 5*s.* per ton. The ash to be analyzed by J. C. Nesbitt, Landsell & Co., on behalf of the sellers, and by — of London on behalf of the buyer; *the two results to be*

*added together*, and the ash invoiced at the mean given: but, in the event of a difference of over 3 per cent. between the results received from the above-named chemists, a third sample to be sent to —, and the mean of the two nearest results to be taken: the third sample to form part of the original, to be sealed and kept in the possession \*303] of the selling brokers or their agents. A fair sample of the ash to \*be taken from time to time in each day's discharge (the weight not to be less than 5 cwt.), and to be ground so as to pass through a 20-holed sieve; and at the completion of the discharge, the same to be under the supervision of both sellers and buyer or their agents, who shall forward the samples to the respective chemists, with instructions to furnish both parties with results.

"The cargo to be weighed in the usual manner, and to be taken with all faults and defects from over the ship's side as fast as the captain can deliver it; failing which, to be resold at the sellers' discretion, and the buyer to be liable for any loss, demurrage, or other expenses arising therefrom. The ship-damaged (if any) to be taken at the selling brokers' valuation.

"The buyer to advance money to pay freight on the entire cargo, and any other charges to which the sellers may be liable, without making any charge for so doing; the amount of such payments to be deducted from invoice.

"In case of non-arrival, this contract to be void: and, should the vessel, from any unforeseen circumstances, be prevented from delivering the whole of the cargo originally shipped, this contract to be void as regards the undelivered portion. In the event of any dispute arising in the completion of this contract, the same to be settled by arbitration in Liverpool.

"*Payment, cash before delivery*, and the weighing of the whole or delivery of part not to be considered a delivery of the whole, *allowing a discount of 2½ per cent. equal to cash in Liverpool within 28 days from last day of landing.*"

"G. F. MARTIN & Co."

On the same 9th of November, the defendant's brokers wrote to him, as follows:—

\*"Liverpool, 9th November, 1863.

\*304] "Henry Knight, Esq.

"Dear Sir,—We duly received your telegram as follows,—'I do not confirm till I see contract. Conditions must be those of a London contract: 2s. 6d. a ton allowed for weighing and port-charges.' We telegraphed in reply,—'Accepted contract on Saturday according to definition in your letter of London terms.' If you will refer to what you wrote us on the 6th instant, you will perceive that you yourself defined the usual London terms, authorizing us at the same time to make the purchase, which we were enabled to do late on Saturday afternoon. We have since applied on your behalf for an allowance of 2s. 6d. per ton for weighing and port-charges; but the brokers refuse, on the ground that they never admit it, and always deliver the cargoes themselves. The contract we trust you will find to be perfectly correct. The clauses relative to sampling and analysis are what are now usual; and we ourselves are of opinion they are decidedly for better protection of both buyer and seller.

"We are offered another cargo, sailed end of August; 290 tons

ash and 60 tons bones. Ash at 5*l.* per ton 70 per cent., bones at 5*l.* 10*s.* per ton. Something less might be accepted for the latter. Will it suit you? "JOHN BECKWITH, JUN. & Co."

On the same day, Beckwith & Co. sent the defendant a bought-note,—

"We have this day bought for your account, of Messrs. Heyworth, Pearce & Balman, per Messrs. G. F. Martin & Co., a cargo of about 280 tons ash, 5 tons bones, and 25 tons piths, more or less, expected to arrive per Vasco di Gama, from River Plate," &c., &c., as in the sold-note.

On the 10th of November, the defendant sent the following telegram to Beckwith & Co.,—

"\*Your terms respecting sampling, analysis, and payment, are Liverpool, not London terms, and are very objectionable. [\*305 I decline the cargo altogether."

Messrs. Beckwith & Co. immediately communicated this telegram to the plaintiffs' brokers, and wrote to the defendant as follows:—

"Liverpool, 10th November, 1863.

"Dear Sir,—We are in receipt of your telegram, viz., 'Your terms respecting sampling, analysis, and payment, are Liverpool, not London terms, and are very objectionable. I decline the cargo altogether.' This we communicated to the sellers, who say in reply that the clauses relating to analysis and sampling are acknowledged to be the best that have yet been framed, to protect both buyer and seller. Nevertheless, though holding you bound by the contract, they are willing to meet you in these respects; also as to the payment being made equal to cash in Liverpool. The contract has been framed on your letter of the 6th instant, which distinctly specifies what are 'usual London terms.' "JOHN BECKWITH, JUN. & Co."

On the same day the defendant replied as follows:—

"London, Nov. 10th, 1863.

"Dear Sirs,—If you refer to my letters of the 6th and 7th instant, you will find that I distinctly stated my objections to Liverpool terms. I have never entered into a contract that contained such a stipulation as to sampling and analysis, nor do I intend; nor have I been asked for cash before delivery, when I have bought through a London house. Moreover, there is always an allowance made to the buyer to cover weighing, port-charges, &c. If I am to treat for the cargo, the basis must be that of a usual London contract.

"HENRY KNIGHT."

\*It was proved that the analysis always was made in London, and that it was the invariable custom to take the mean of [\*306 the two chemists.

On the part of the defendant it was submitted that the correspondence did not show a contract between the parties upon the only terms upon which the defendant was willing to contract, viz., those contained in his letter of the 6th of November; the plaintiffs' acceptance thereof differing from the offer in two important respects,—first, in respect of the analysis, which was to be the "mean of two London chemists,"—secondly, in respect of the sellers requiring cash before delivery, the defendant's offer being "cash in twenty-eight days."

On the other hand, it was insisted that the letters of the 6th and

7th of November contained a complete contract, and that there was no substantial difference between the terms contained therein respectively.

In answer to a question put by the learned judge to one of the defendant's witnesses (Mr. John Beckwith), that gentleman said that there was no difference between "cash" and "prompt."

Under the direction of the learned judge, a verdict was found for the plaintiffs, leave being reserved to the defendant to move to enter a nonsuit or a verdict for him, if the court should be of opinion that there was no evidence of any contract made in accordance with his letter of the 6th of November, 1863.

*Mellish*, Q. C., in Easter Term last, obtained a rule nisi accordingly.

*Edward James*, Q. C., and *M'Culloch*, now showed cause.—They submitted that the letters of the 6th and 7th of November constituted a complete contract,—an offer on the one side and an acceptance on \*307] the \*other; and that there was no substantial variance between the terms of the two documents either in respect of the period of payment or in the mode of analysis. *Gregson v. Ruck*, 4 Q. B. 737 (E. C. L. R. vol. 45), was referred to.

*Mellish*, Q. C., and *Little*, in support of the rule.—The first question is, which is the binding contract, the letters or the sold-note? It is clear that the correspondence was mere negotiation, and that the contract which was to bind the parties was that contained in the sold-note. That being rejected by the buyer, and properly rejected, because it contained terms differing from and inconsistent with the offer he had made through his brokers, it was not competent to the sellers afterwards to fall back upon the letters. [WILLES, J.—As far as it goes, *Cowie v. Remfry*, 5 Moore's P. C. 232, seems rather in your favour.] This is even a stronger case than that. [BYLES, J.—All the terms are agreed on in the letters of the 6th and 7th of November: and there is no plea of rescission.] The defendant could not have gone on with the contract without being bound by all the conditions contained in the bought and sold-notes, and these differed materially from the terms proposed on the part of the defendant as well in the mode of payment as in the way in which the analysis was to be made.

ERLE, C. J.—The question is, whether the letters of the 6th and 7th of November, 1863, which passed between the respective brokers, constituted a contract within the authority given by the defendant to his brokers. The authority was, to buy the ash "at 100s. on a basis of 70 per cent. mean of two London chemists: usual London terms, viz. cash in twenty-eight days, less 2½ per cent." The terms in which that was communicated by the defendant's brokers to the \*308] plaintiffs' brokers were as follows,—"cash in \*twenty-eight days from last day of landing, less 2½ per cent.: to be analyzed by two London chemists,"—omitting the mention of the "mean." And this was in terms accepted. I am of opinion that the contract was within the authority. The words, as to the analysis, are,—"To be analyzed by two London chemists." I am very clear that this was to be performed in London; and there was evidence that it was the known usage in London to take the mean of the two. Then, as to the other alleged variance between the authority and the contract,—

the declaration is framed upon a contract "upon usual London terms, viz. payment by cash in twenty-eight days, less  $2\frac{1}{2}$  per cent. discount:" and that is in words as well as in substance within the authority given. Something was said by Mr. Mellish about the letters not constituting a binding contract between the parties, because a more regular and extended contract was contemplated. That notion, however, is totally at variance with the law as laid down by many cases in the Court of Queen's Bench, where the broker's book has been allowed to be resorted to for evidence of the contract, though the parties intended to contract by means of bought and sold-notes, where there has been a variance between those documents.(a) And there is no case that I am aware of to the contrary. The letters here would certainly constitute a sufficient contract to satisfy the Statute of Frauds.

WILLES, J.(b)—I am of the same opinion. The authority given by the defendant to his brokers, was, to enter into a contract upon terms which have been adhered to, and which therefore I need not specify. It is said that that authority was departed from in two \*respects. In the first place, the defendant writes that he will take the [\*309 ash at the price mentioned "on a basis of 70 per cent. mean of two London chemists," and on "usual London terms, viz. cash in twenty-eight days, less  $2\frac{1}{2}$  per cent." It is said that in both these respects the brokers departed from the authority which was delegated to them, in the contract which they entered into. After the discussion which has taken place, it is evident that the extended contract of the 9th of November contained in the bought and sold-notes did in the first particular materially depart from the authority; and therefore it is clear that no reliance can be placed upon that extended contract so as to bind the principal. "Mean of two London chemists," according to the usage of the trade in London, means that each party should appoint one to make an analysis, and, if they agree, their analysis is to be deemed satisfactory and conclusive; but, if they should differ, the mean between the two analyses is to be held binding. The extended contract-note, however, which was delivered by the sellers' brokers, differed in this, that it superadds, that, in the event of a difference of over 8 per cent. between the results received from the two chemists named, a third sample should be sent to another chemist, who was to act as a sort of umpire, and the mean between the two nearest results should be taken.(c) The contract-note of the 9th of November, therefore, is to be rejected; and we must look at the letters of the 6th and 7th to see what the parties were contracting for. Now, to charge the defendant, there must not only be a contract, but a \*con- [\*310 tract within the authority of the brokers. The question is, whether these two letters were intended to constitute a binding contract, or whether the contract by which the parties were to be bound, was a formal contract to be afterwards drawn up. The only ground upon which it could be held that a subsequent formal contract was necessary to complete the bargain, is, either that there is some usage

(a) See *Sievewright v. Archibald*, 17 Q. B. 103 (E. C. L. R. vol. 79).

(b) *Williams, J.*, was at the Central Criminal Court.

(c) Thus, if the chemist named by the sellers found 72 per cent. of phosphate, and the chemist named by the buyer 68 per cent., and a third chemist was called in who found only 66 per cent., the result arrived at would be 67 per cent. Surely this was not the intention.

in this particular trade to buy by means of bought and sold-notes, or there was a desire to that effect in the expression contained in Beckwith & Co.'s letter of the 7th of November, confirming Martin & Co.'s acceptance of their offer,—“Contract, we presume, in due course, say on Monday.” As to custom to contract by bought and sold-notes in this trade, there was no evidence: the case, therefore, does not fall strictly within that of *Cowie v. Remfry*, 5 Moore's P. C. 232, to which \*311] I referred in the course of the argument.(a) Had it done \*so, I should have been prepared to say that I agree with the dissenting judge, and not with the other members of the judicial committee who pronounced that judgment.(b) I apprehend that, if that case had come before a common-law court, it would have been decided in conformity with the decision of the Supreme Court. It never could have been held by a court accustomed to deal with commercial matters, where a document in writing had been assented to by the seller and corrected and initialled by the buyer, that, because a subsequent note was delivered somewhat differing from the former, therefore there was no contract between the parties. I cannot consent, with all respect for so high a tribunal, to be bound by that decision. Then, with respect to the expression in Beckwith & Co.'s letter, “Contract, we presume, in due course,”—does that mean that the buyer's acceptance of the bargain is to depend upon a subsequent formal contract to be drawn up between the parties? I think not. The contract was finally accepted by Beckwith & Co.'s letter to the sellers' brokers of the 7th of November, which amounts to this,—“We confirm your acceptance of our offer; but it would be better that we should by a more formal instrument extend the terms of our contract, which of themselves are sufficient, construed by mercantile \*312] usage and the course of dealing.” That \*clearly does not prevent the sellers from showing that the terms of the contract had already been definitively agreed on. I speak not without authority. I may refer to a long series of cases which arose prior to the 8 & 9 Vict. c. 106, s. 3, which requires leases to be by deed under seal. Questions were often raised as to whether an instrument amounted to a lease or only to an agreement; and one argument in

(a) There, *Cowie & Co.* and *Hamilton & Co.* were merchants at Calcutta. *Hamilton & Co.* sold to *Cowie & Co.* a large quantity of indigo, through the medium of a broker, who drew up a sold-note addressed to *Hamilton & Co.*, and submitted it to *Hamilton* for his approval, when, *Hamilton* having objected to a particular word remaining, the broker took the sold-note to *Cowie* and informed him of *Hamilton's* objection. *Cowie* struck his pen through the word objected to by *Hamilton*, placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to *Hamilton & Co.* The broker delivered to *Cowie & Co.* on the following day a bought-note which differed in certain material terms from the sold-note. In an action brought by *Hamilton & Co.* against *Cowie & Co.* for non-performance of the contract contained in the sold-note,—the Supreme Court at Calcutta was of opinion that the sold-note alone formed the contract, and found for the plaintiffs. Upon appeal, held by the judicial committee (reversing such finding), that the transaction was one of bought and sold-notes, and that the circumstances attending *C.'s* alteration of the sold-note and affixing his initials were not sufficient to make that note alone a binding contract; and that, there being a material variation in the terms of the bought-note from the sold-note, they together did not constitute a binding contract.

(b) The judgment was delivered by *Dr. Lushington*,—the other members of the judicial committee present being, the Duke of Buccleuch, Lord Brougham, the Vice-Chancellor Knight Bruce, and the Hon. Pemberton Leigh: *Sir E. H. East* and *Sir Edward Ryan* being assessors. The dissentient judge was the Hon. Pemberton Leigh.

favour of the latter construction was founded upon the existence of a provision that a more formal lease should be drawn up. That argument, however, was not allowed to prevail. Nor ought the same line of argument to be permitted to influence our decision here. It seems to me, therefore, that the letters of the 6th and 7th of November constitute a valid and binding contract. Then, was it a contract within the terms of the brokers' authority? Now, with regard to the time and mode of payment, the terms of Beckwith & Co.'s letter of the 7th are,—“Cash in twenty-eight days from last day of landing, less  $2\frac{1}{2}$  per cent.” The terms of the authority (the letter of the 6th) are,—“Usual London terms, viz. cash in twenty-eight days, less  $2\frac{1}{2}$  per cent.” The words “from last day of landing,” are supplied both by the custom of Liverpool and that of London. Prompt means the same in both. There remains only the objection as to the analysis. In the letter of authority, it was to be the “mean of two London chemists:” but, in Beckwith & Co.'s offer of the 7th it was “To be analyzed by two London chemists,” not saying what was to happen if the two differed,—whether the contract was to drop, or whether an umpire was to be called in, or the mean of the two to be taken, does not appear. That might very likely lead to disputes, because in the document of the 9th of November you find something else than a mean of the two represented as what is to happen if the two first-named \*chemists should differ to an extent exceeding [\*313 3 per cent., viz. a third sample is to be sent to another chemist, and the mean of the two nearest results to be taken. But I cannot help thinking that there is a mode of putting a construction upon the contract contained in the letters which is in strict accordance with the authority given: and that is to be found in this, that the analysis is to be that of two London chemists, and there was evidence that the practice in London is to take the mean of the two. It seems to me that it will be no straining of the language of the contract, to hold that the result of the analysis is to be in accordance with the custom of the place where the analysis is to be made. I must add,—though that is by no means a satisfactory argument,—that I cannot help thinking it is quite clear what was intended; for, the expression “*mean of two London chemists*” is used, not by the persons representing the sellers, but by the broker, and a London buyer. I do not press that argument: but at the same time it is satisfactory to know that the result we have arrived at was obviously the meaning of the parties. For these reasons I am of opinion that the verdict for the plaintiffs ought not to be disturbed.

BYLES, J.—I am of the same opinion. After having listened attentively to the arguments which have been urged on the part of the defendant, I can see no principle, nor am I aware of any authority, for saying that a contract in writing which is sufficient within the Statute of Frauds can be invalidated or affected by a subsequent abortive attempt to put it in a more formal shape. The mere fact of an agreement providing for a more complete and formal development of the intention of the parties, cannot of itself prevent the operation of the preliminary contract: it has been \*repeatedly so held [\*314 in the cases of contracts for leases. As to the analysis, I entirely agree with what has fallen from my Brother Willes: and, if



the construction of the contract between these parties had been even more doubtful than it is, I think we should be bound so to construe it *ut res magis valeat quam pereat*. The ash was to be analyzed by two London chemists. What was to be done if they should differ? What so obvious as to take the mean? I am not, perhaps, very perfectly acquainted with all the facts: but I should say, that, where a merchant deals with a broker, he has a right to assume that the broker has authority to do all that is within the ordinary scope of the authority of a broker.

Rule discharged.

### BRIDGES v. POTTS and Another. June 10.

1. By an agreement for a lease of mines and ironworks between A. and B., the former agreed to grant and the latter to accept a lease of the ironworks and premises for twenty-one years from the 19th of August, 1861, subject to the stipulations thereafter contained; such lease to contain, in addition to anything specially provided for in the agreement, proper covenants for the effectual working of the minerals, for the repair, &c., of the works, for keeping proper accounts, and for permitting A. or his agents to inspect such works and accounts, and all other usual and customary clauses; and it was further agreed that B. should pay to A. during the continuance of the agreement or the lease to be granted thereunder certain royalties on coals and minerals obtained,—that if, in the first and second years, the royalties should not amount to 500*l.* each year (or in the third and any subsequent year 1500*l.*), then B. should advance and pay to A. for each of those years such sum as with the royalties for that year would make up the full sum of 500*l.* or 1500*l.*,—that, if any sum of money should be so advanced to make up “the said respective minimum *rents*” in any one year, the amount of such advance might be deducted out of the excess of royalties above such minimum *rent* accruing during any succeeding year,—that B. should pay to A., by way of *rent* for the plant, &c., the yearly sum of 7000*l.* during the continuance of the demise, B. to have the right, in any year in which the profits arising from the works should not amount to 21,000*l.*, to pay so much only of the said *rent* as should be equal to one-third of the profits of such year,—that B. should forthwith commence operations, and within three months expend such sum as might be required for the erection of machinery, &c., and would, so long as the agreement or lease should subsist, use all diligence to work the minerals effectually and profitably; and that, in consideration of such expenditure, no royalties or sum in lieu thereof should be payable in respect of such three months’ workings,—that, in case, within the second three months from the date of the agreement, the royalties did not amount to 125*l.*, and B. did not pay that sum in anticipation of future royalties, A. should be at liberty, at the end of one month from the expiration of such second three months, by notice in writing to annul and determine the agreement: or if, within any six months after the expiration of such second three months, B. did not pay A. in royalties or in money the sums thereby respectively made payable, or if B. should cease to carry on the works with due diligence and effect for three months, A. should be at liberty, at the end of one month from the expiration of any such six months, or of any such three months’ cessation or want of diligence in working, by three months’ notice in writing, to annul and determine the agreement or the lease thereby agreed to be granted,—and that B. was to be at liberty, at any time thereafter, to determine the agreement, or the lease thereby agreed to be granted, and to abandon the works, on giving A. *six months’ notice* in writing of his intention so to do.

B. entered under this agreement; and no lease was ever granted. The 125*l.* dead *rent* was paid for the second quarter, ending on the 19th of February, 1862; and a further sum of 250*l.* was paid for the half year ending on the 19th of August, 1862. No further payment was made in respect of *rent* or royalties until the 21st of November, 1863, when B. paid 500*l.* for the *rent* accruing for the year ending on the 19th of August.

On the 10th of August, 1863, B. gave A. a *six months’ notice* to determine the agreement on the 13th of February, 1864:—

Held,—*dubitante Williams, J.*,—that, regard being had to the various provisions of the agreement and the nature of the property demised, it was competent to B. to put an end to the agreement by a six months’ notice, to expire at any time,—without regard to the ordinary rule for determining a tenancy from year to year at the expiration of a current year; and that

A. was only entitled to recover the proportion of the dead rent accruing between the 19th of August, 1863, and the 13th of February, 1864.

*Quære*, per Williams, J., whether the Apportionment Act of 4 & 5 W. 4, c. 22, s. 2, is applicable to such a case?

*Semble*, per Byles, J., that it is.

THIS was an action brought by the plaintiff against the defendants for the recovery of 1500*l.* for money payable by the defendants to the plaintiff for the \*defendants' use by the plaintiff's permission [\*315 of lands, tenements, and hereditaments of the plaintiff; and by the consent of the parties and by a judge's order, according to the Common Law Procedure Act, 1852, the following case has been stated for the opinion of the court, without pleadings:—

1. On the 19th of August, 1861, the following agreement in writing, but not being under seal, was made between the plaintiff, hereinafter called the lessor, of the one part, and the defendants and one Charles Thomason Thompson, hereinafter called the lessees, of the other part, that is to say,—

“Memorandum of agreement made this 19th day of August, 1861, Between John Bridges, of, &c., Esq. (hereinafter called the lessor), of the one part, and Charles Thomason Thompson, of, &c., Joseph Tromperant Potts, of, &c., and Frederick George Hely, of, &c. (hereinafter called the lessees), of the other part.

Article 1. The lessor agrees to grant, and the lessees \*agree [\*316 to accept, a lease of certain works known as the Creevelea Iron Works, situate in the county of Leitrim, in Ireland, comprised in a lease dated the 24th of January, 1853, and of which lease the lessor is now owner, being a lease of minerals, &c., within the townlands of Gowlane and Tullynamoyle, in the barony of Dromahaire, in the said county of Leitrim, containing 1105 statute acres, with powers and facilities for working same, together with workmen's cottages and buildings adjoining the said premises comprised in such lease. The term to be twenty-one years from the 19th day of August, 1861, subject to the stipulations hereinafter contained: and such lease shall contain, in addition to anything specially provided for herein, proper covenants for the effectual working of the said minerals, for the preservation, protection, and keeping in repair the said works, for keeping proper accounts, and for permitting the lessor or his agents to inspect such works and accounts, and all other usual and customary clauses: such lease to be settled, in case of difference, by some counsel agreed upon by the parties, and to be prepared by the lessor at the expense of the lessees.

Article 2. The lessees to pay to the lessor during the continuance of this agreement, or the lease to be granted thereunder, the following royalties, namely 1*s.* per ton on ironstone, 6*d.* per ton on coal raised from the said townlands of Gowlane and Tullynamoyle, with a drawback of 3*d.* per ton on all such coal as shall be used for the purpose of the said ironworks, 6*d.* per ton on fire-clay, 2*d.* per ton on dry peat, and 1*s.* 2*d.* per ton on limestone obtained from the said townlands.

Article 3. If in the first and second years the royalties above provided for shall not amount to the sum of 500*l.* each year, then the

\*317] lessees shall advance and \*pay to the lessor for each of those years such sum of money as, with the amount of the royalties for that particular year, will make up the full sum of 500*l*. If in the third and any subsequent year of the said term the said royalties do not amount to the sum of 1500*l* each year, the lessees shall pay to the lessor such a sum as with the royalties will make up the full sum of 1500*l*.

Article 4. If any sum of money be so advanced to make up the said respective minimum rents in any one year, the amount of such advance may be deducted out of the excess of royalties above such minimum rent accruing during any succeeding year.

Article 5. The lessees to pay to the lessor by way of rent for the plant, furnaces, and engines situate on the said premises, the yearly sum of 7000*l*. during the continuance of the said demise; the lessees to have the right in any year of the said demise in which the profits made by them from the said works shall not amount to the sum of 21,000*l*., to pay only so much of the said rent as shall be equal to one-third of the profits of such year: and, in the lease hereby agreed to be granted, due provision shall be made for securing the payment of the said rent (reducible as aforesaid) to the said lessor; but so as not to constitute any partnership in respect of the said works between the lessor and the lessees.

Article 6. The lessees will forthwith commence operations at the said works, and will within three months from the date hereof expend such a sum of money as shall be required for the erection of machinery and the further developing the minerals, and will thenceforth so long as this agreement or lease thereunder subsists use all diligence to work the same effectually and profitably: and, in consideration of such expenditure, no royalties or sum of money in lieu \*318] thereof shall \*be payable in respect of such three months' workings.

Article 7. In case within the second three months from the date hereof the royalties payable do not amount to 125*l*., and the lessees do not pay that sum in anticipation of future royalties, then the lessor shall be at liberty, at the end of one month from the expiration of such second three months, by notice in writing, to annul and determine this agreement: or if, within any six months after the expiration of such second three months, the lessees do not pay to the lessor in royalties or in money the sums of money hereby respectively made payable, allowing for any set-off under the average clause hereinbefore contained; or if the lessees shall cease to carry on the said works with due *bonâ fide* diligence and effect for a period of three months, then and in any or either of such cases the lessors shall be at liberty, at the end of one month from the expiration of any such six months as aforesaid, or of any such three months' cessation or want of diligence in working as aforesaid, by three months' notice in writing, to annul and determine this agreement or the lease hereby agreed to be granted in case the same shall then have been executed, but without prejudice to the lessor's rights thereunder for rent or otherwise.

Article 8. The lessor, being also owner of certain collieries in the counties of Leitrim and Roscommon for certain terms of years unexpired, agrees, that, on the first lease being granted or sale made of

any one of such collieries, it shall be stipulated that the lessees under this agreement shall be at liberty to purchase for the use of the Creevelea Iron Works so much coal from such colliery so first leased or sold as aforesaid as they may require, at a price not exceeding at the pit's mouth 10 $\frac{1}{2}$  per cent. profit to the colliery over and above the cost of production.

\*Article 9. The lessees to be at liberty at any time hereafter to determine this agreement, or the lease hereby agreed to be [\*319 granted, and to abandon the said ironworks, on giving to the lessor six months' notice in writing of their intention so to do."

2. Possession of the said premises under the said agreement was delivered by the lessor to the lessees on the same 19th day of August immediately after the making of the said agreement; and the lessees then entered into such possession, and occupied the said premises until the expiration of the notice hereinafter mentioned, when an arrangement was made between the lessor and the lessees as herein-after mentioned.

3. The lessees forthwith commenced, and during the first three months and afterwards carried on certain preparatory operations at the said works, and expended certain moneys, but did not during the said three months, or at any time afterwards during their said occupation of the said premises, raise or get any iron-stone, coals, or other minerals, and never paid any royalty whatever; but, nevertheless, the lessor waived all claim to royalty or rent in respect of such three months ending on the 19th of November, 1861, and none was paid.

4. After the expiration of one half-year next after the making of the said agreement, that is to say, upon the 24th of February, 1862, in consequence of no rent or royalty whatever having been paid by the lessees, the lessor caused the following letter relating to the said previous agreement and occupation to be written, addressed, and delivered to the said Charles Thomason Thompson, as such lessee:—

"28, Red Lion Square,  
"February 24th, 1862.

"Dear Sir,—I may remind you that six months \*have now [\*320 elapsed since the agreement was signed with yourself and co-lessees: and, though I am aware that you have been expending a good deal of money at Creevelea, I cannot but feel (and so does Mr. Twells) that both from what passed with yourself and what is expressed in your agreement, the manufacture of iron ought long ere this to have commenced; and I think some explanation of the delay and the future intentions of the lessees is due to us.

"There being of course as yet no royalties, I have simply to ask you to procure my father a check for 125 $\frac{1}{2}$ l. due under Article 7; and I might, perhaps, in strictness, urge that there should be two such payments, as the waiver of payment during the first three months was in consideration of 'workings' to be done which have not been done.

"We have recently heard from Mr. Johnstone, the agent, that there is a quantity of bar-iron and calcined iron at Creevelea, which is certainly not included in the agreement. If the lessees wish to make use of it, they should pay for it at a valuation; if not, we should be glad to sell it, as there are some claims which might properly be

paid from the proceeds. I address yourself as the only one of the lessees whom I have had the pleasure of seeing, not doubting that you will put these matters forward in the proper quarter.

"NATHANIEL BRIDGES."

5. On the 6th of March, 1862, the lessees paid to the lessor the said sum of 125*l.* as and for rent payable in respect of their said occupation of the premises under the said agreement for one quarter of a year ending on the 19th of February, 1862.

6. Upon the 28th of October, 1862, in consequence of no further payment having been made by the lessees, the lessor caused the following letter relating to the previous agreement and occupation to be \*321] written, \*addressed, and delivered to the said Joseph Trompe-

rant Potts, as such lessee as aforesaid:—

"35, North Cumberland Street, Dublin.

"28th October, 1862.

"Sir,—We have been directed to apply to you professionally on the part of Mr. John Bridges, of Red Lion Square, London, in respect of the rents and royalties now due by you and your copartners, Messrs. Thompson and Hely, for the Creevelea Iron Works, in the county of Leitrim, under your agreement of the 19th of August, 1861. By the second article of that agreement, you are bound to pay certain royalties for certain ores, minerals, and products raised from the lands of Tullynamoyle and Gowlane, the lands whereon said ironworks are situate; and by the third clause it is provided, that, in case such royalties shall not amount to the specified sums of 500*l.* for the first and second years, and 1500*l.* for the third and subsequent years of the term mentioned in the said agreement, then that you should pay such sums as with the royalties would make up said sums of 500*l.* and 1500*l.* per annum respectively; and by the fifth article of said agreement, you also bound yourself to pay by way of rent for the plant, furnaces, and engines situate on said premises, the yearly rent of 7000*l.*, or such sum as should be equal to one-third of the profits of the said concerns in each year. Now, in order to ascertain the sum now due and payable to the said John Bridges for royalties and rents under the said articles 2, 3, and 5 of said agreement before referred to, we have to require that you furnish us within one week from this date with a statement in writing of the quantity of ironstone, coal, fire-clay, peat, and limestone obtained from said town lands since the date of said agreement, as also with a return of the profits realized in respect of the working of the said concern. And \*322] we \*have to inform you, that, in case you shall neglect or refuse to furnish us with such statement and particulars, we shall proceed to recover against you and your copartners such sums as Mr. Bridges is entitled to recover under said articles: and this application will be made such use of hereafter as counsel may advise.

"GALLAWAY & CONNOR."

7. On the 3d of November, 1862, the lessees paid to the lessor the said sum of 250*l.* as and for rent payable in respect of their said occupation of the said premises under the said agreement, for one half-year ending on the 19th of August, 1862.

8. No further payment was made by the lessees until the payment of 500*l.* on the 21st of November, 1863, as hereinafter mentioned.

9. On the 10th of August, 1863, the lessees served on the lessor the following notice in writing relating to the said previous agreement and occupation:—

“To John Bridges, Esq.

“Take notice that we do hereby, in pursuance of the power contained in the memorandum of agreement dated the 19th of August, 1861, and made between yourself of the one part and ourselves of the other part, determine the agreement for a lease of the minerals and premises therein comprised, on the 13th day of February, 1864, or on such other day thereafter as the six months’ notice contemplated by the 9th clause of the said memorandum of agreement shall legally expire on. Dated this 10th day of August, 1863.

“CHARLES T. THOMPSON.

“J. T. POTTS.

“FREDERICK GEO. HELY.”

10. The said notice was accompanied by the following letter of the same date, addressed to the lessor by the lessees, through their solicitors:—

\*“10, Tokenhouse Yard, London, [\*323  
“10th August, 1863.

“Sir,—I send you herewith by bearer a notice from Messrs. Thompson, Potts, and Hely, to yourself, to determine the agreement of the 19th August, 1861, for a lease of the Creevelea Iron Works: and I shall be obliged by your acknowledging the receipt of it.

“CHARLES WILKIN.

“John Bridges, Esq.”

11. The lessor on the same day returned to the lessees through their solicitor the following answer to the last-mentioned letter:—

“23, Red Lion Square,  
“August 10th, 1863.

“Sir,—We have received your letter of this date addressed to Mr. John Bridges, enclosing a notice from Messrs. Thompson, Potts, and Hely, of same date, and accept service thereof for Mr. Bridges, saving and without prejudice to all and every his rights under the agreement of 19th August, 1861, therein referred to.

“BRIDGES & SON.

“Charles Wilkin, Esq.”

12. Upon the 10th of November, 1863, in consequence of no further payment having been made by or on behalf of the lessees, the lessor caused to be issued a writ of summons out of Her Majesty’s Court of Queen’s Bench in Ireland, in an action of debt against the said Joseph Tromperant Potts,—the other two of the said lessees then being out of the jurisdiction of the said court,—for the recovery from him as such lessee of the sum of 500*l.* for one year’s rent ending on the said 19th of August, 1863; and, under the pressure of the said writ, the said Joseph Tromperant Potts, on the 21st of November, 1863, paid on behalf of the said lessees to the lessor the said sum of 500*l.* (of which sum the said Frederick George Hely contributed \*one- [\*324 third), as and for rent payable in respect of the said occupation by the lessees of the said premises under the said agreement, for one year ending on the said 19th of August, 1863.

13. The lessees contend that the said tenancy was determined on

the said 13th of February, 1864, by virtue of the said notice; and that they are only liable to pay an apportioned part of the said rent of 1500*l.* up to the said 13th of February, 1864: but the lessor contends that it continued until the end of the current year of the said tenancy, that is to say, the 19th day of August, 1864, and that the lessees are liable to pay the whole rent of 1500*l.*

14. The lessor and lessees have agreed to submit the above case for the opinion of this court, and have arranged for the occupation of the premises in the meantime without prejudice to the rights of either of the said parties.

The question for the opinion of the court is, whether the said tenancy was determined by the said notice on the 13th of February, 1864, or whether the said tenancy continued until the end of the then current year, that is to say, the 19th of August, 1864.

If the court should be of opinion that the said tenancy was determined by the said notice in February, 1864, then judgment was to be entered for the plaintiff for a proportionate part of the sum of 1500*l.* as the court might direct, but without costs; and the judgment was to be entered for the defendants for the costs. If the court should be of opinion that the said tenancy was not determined by the said notice until the end of the current year of the said tenancy, in August, 1864, then judgment was to be entered for the plaintiff for the sum of 1500*l.*, together with costs; but, if the judgment of the court be delivered before the said 19th day of August, 1864, then with a stay of execution until after that day.

\*325] *G. R. Clarke*, for the plaintiff. (a)—The instrument being void as a lease by force of the statute 8 & 9 Vict. c. 106, s. 3, it operates to create a tenancy from year to year upon the terms therein contained so far as they are applicable to a tenure of that description, one of which is that the tenancy shall be determinable by a six months' notice expiring with a current year: and this would be the obvious import of the 9th article, but for the introduction of the words "at any time hereafter," which are relied upon as raising an ambiguity. There is nothing in the general scope of the agreement to show that that article is to be understood in any other than the ordinary sense. The parties evidently must have contemplated a yearly tenancy with all its incidents. No rent becomes payable until the end of the year. The notice which the lessor was empowered under article 7 to give, is with a totally different object. In *Doe d. Pitcher v. Donovan*, 1 Taunt. 555, where by the terms of the tenancy the tenant was to be at liberty to quit at a quarter's notice, it was held that the notice must expire with a year of the tenancy. Sir James Mansfield, in giving judgment, says: "At the time of the trial, it was a question what was meant by the quarter's notice. I \*326] \*thought it meant a quarter of a year ending at any time: but

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That a yearly tenancy has been created upon the terms of the agreement of the 19th of August, 1861, so far as applicable to such yearly tenancy:

"2. That such yearly tenancy is only determinable at the end of a current year:

"3. That the six months' notice in writing mentioned in the ninth article of that agreement, means a notice to determine the tenancy at the end of a current year:

"4. That the lessees are bound to pay the full sum of 1500*l.* for the year, whether they hold the premises to the end of the current year, or abandon them in the midst of the year."

that interpretation certainly admits of the question raised by the defendant's argument, whether it shall be a quarter of a year's notice ending, not at one of the four most usual days of payment in the year, but in the middle of what is usually called a quarter. The evidence given was of a quarter's notice, leaving it entirely to the law to ascertain the meaning of the expression: and, as there is no satisfactory explanation that this contract for a quarter's warning had any other meaning than that which the general law gives it, we think it better to hold (and certainly it is the most rational interpretation) that the notice to quit was intended to expire at the end of the year." [ERLE, C. J.—Chambre, J., however observes that that rule is applicable only to the case of a tenancy from year to year.] In *Dod v. Monger*, 6 Mod. 215, Holt 416 (E. C. L. R. vol. 8), where the contract was for a tenancy for a year, and so from year to year as long as both parties should please, with a stipulation that the lessee should not go away without giving a quarter's warning, Holt, C. J., said: "If at the year's end the lessee had given up the possession without any warning, he would be liable to pay a quarter's rent by virtue of this agreement; but, if he had given a quarter's warning, he might quit without more ado; but, if he once entered upon the second year, he would be bound for all that year, and to a quarter's warning, and so on." Doe d. *King v. Grafton*, 18 Q. B. 496 (E. C. L. R. vol. 88), is an authority to the same effect. Indeed, the rule is so well known that it can scarcely be necessary to cite cases to support it.

*Mackeson*, for the defendants.(a)—The question is "what is the meaning of the parties, having regard to the general scope [\*327

(a) The points marked for argument on the part of the defendants were as follows:—

"That the tenancy of the lessees under the agreement of the 19th of August, 1861, was determined in February, 1864, by the notice dated the 10th of August, 1863, and that the lessees are only bound to pay a proportionate part of the sum of 1500*l.* calculated up to the 13th of February, 1864, or at all events calculated only up to the 19th of February, 1864,—

"1. Because there is no rule of law which requires every notice for determining a tenancy to end at the period corresponding with the commencement of the term:

"2. Because the rule that a notice to quit must expire with some year of the tenancy, only applies to a tenancy from year to year:

"3. Because there is a special stipulation in the agreement that the six months' notice may be given at any time, and the parties to the agreement framed it with the express purpose of taking the case out of the general rule, if any would have been applicable:

"4. Because the words in the ninth clause of the agreement, 'at any time hereafter,' are wholly unlimited:

"5. Because the sole power of fixing that limit is in the lessees:

"6. Because the words 'at any time hereafter,' unless they bear the construction put on them by the defendants, have no meaning, and must be struck out as surplusage,—a conclusion at which the court will not arrive:

"7. Because there is nothing in the agreement either express or implied, to show that any particular six months' notice was contemplated:

"8. Because the lessor had by the agreement the power in certain cases of determining the agreement by notice ending at some break in a quarter, thereby showing that the determination of the agreement at the end of some current year, or even at any half or quarter of some current year, was not in the contemplation of the parties:

"9. Because the agreement, being for a lease for mining purposes, was in its nature, and by its very terms, of an experimental character, and the intention manifestly was, that, if in the working of the mine it should appear that no profit was likely to arise, the lessees were upon any probability of failure to be at liberty to determine the agreement by immediate notice of six months commencing from such period of failure, as the lessees might determine:



of the instrument. Though the agreement be void as a lease, it must regulate the terms of the holding in all respects save the duration of the term: per Lord Kenyon, in *Doe d. Rigge v. Bell*, 5 T. R. \*328] 471; *Braythwaite v. Hitchcock*, 10 M. & W. 494. The holding can only be put an end to upon the terms the parties have agreed upon. The 7th article points out the manner of determining it by the lessor on non-payment of the royalties or omission to carry on the works with due diligence: and by article 9 it is distinctly provided that "the lessees are to be at liberty at any time hereafter to determine this agreement, or the lease hereby agreed to be granted, and to abandon the said iron-works on giving to the lessor six month's notice in writing of their intention so to do." The dry rule of law laid down in the cases cited is altogether inapplicable here. The words in Article 9, "at any time hereafter" must have some meaning. The rent provided for is a dead rent. *Doe d. Landsell v. Gower*, 17 Q. B. 589 (E. C. L. R. vol. 79), comes very near the present case. There, the tenant was let into possession of a cottage, parochial property, by the parish officers of P., on which occasion the following memorandum was made in the vestry-book, and signed by the tenant and by an overseer,— "We, the churchwardens and overseers of P., do hereby agree to let to J. B., of, &c., the newly erected cottage, &c., situate, &c., at the rent of 1s. 6d. per week; and the said J. B. doth hereby agree to quit and give up the said cottage into the hands of the parish officers at any time on a month's notice from the churchwardens and overseers for \*329] the time being, or \*one of them, or by their order:" and this was treated as a holding that might be determined by a month's notice given at any time. The general scope of this agreement is, to create an indefinite tenancy which should subsist until a six months' notice was given. [BYLES, J.—It is stipulated by the 1st article of the agreement that a lease shall be granted for the term of twenty-one years. Suppose a lease had been executed, would it have been determinable by a six months' notice?] It is submitted that it would. The 9th article is express. It is not to be lost sight of that this was an experimental mining lease; with an option to the lessees to put an end to the experiment at any time if it should turn out to be an unprofitable speculation: and it is no objection that the option to determine (except for the causes of forfeiture mentioned in article 7) should be confined to the lessees: *Dann v. Spurrier*, 3 Bos. & P. 399, *Doe d. Webb v. Dixon*, 9 East 15. As to the argument that the rent is only payable at the end of the year, that is clearly a fallacy. [WILLES, J.—The agreement provides that the lease should contain, in addition to anything specially provided for therein, proper covenants for the effectual working of the minerals, &c., and all other usual and customary clauses. It is not usual to covenant for payment of rent yearly.] The 7th article clearly contemplates half-yearly payments.

*Clarke*, in reply.—The words "at any time hereafter" in article 9 cannot be allowed to control the general effect of the contract, which is, to create a yearly tenancy, at a yearly rent. The words of the

"10. Because a notice to quit need not mention the particular day on which the tenancy is intended to determine :

"11. Because the notice sufficiently points out the time when the agreement and tenancy is to determine."

instrument in *Doe d. Landsell v. Gower*, 17 Q. B. 589 (E. C. L. R. vol. 79), are altogether different; and there was no decision upon the point. *Doe d. Rigge v. Bell*, 5 T. R. 471, is in favour of the plaintiff's contention. It was there held, \*that, if a landlord lease for seven [\*330 years by parol, and agree that the tenant shall enter at Lady-day and quit at Candlemas, though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects, and therefore the landlord can only put an end to the tenancy at Candlemas. The words "usual and customary clauses," in article 1, only mean such clauses as are usual and necessary to carry out the intention of the parties; not to introduce a new term into the lease.(a) *Cur. adv. vult.*

ERLE, C. J.—The question argued before us in this case has been, whether the interest of the tenants under the agreement set out in the special case has been determined by a six months' notice delivered by them to the landlord. I am of opinion that it has. The interest of the tenants was in reality a tenancy from year to year, subject to the terms of the agreement so far as they are applicable to a tenancy from year to year. The agreement was for a lease for twenty-one years from the 19th of August, 1861, and the parties contemplated and particularly provided that a formal lease should be executed, and that such lease should contain all usual covenants. The instrument (which is a lease of mining property) contains a provision for certain royalties on the minerals obtained, and then it provides, in case the royalties should not amount to that sum, for that which I consider to be in the nature of a dead rent, such dead rent to be 500*l.* in the first and second years of the term, and 1500*l.* in each \*subsequent year. [\*331 These sums are spoken of as the "yearly rent:" but I take it to be clear, from article 7, that these sums are to be payable at less spaces of time than from year to year; because that article provides, that, in case, within the second three months from the date of the agreement, the royalties payable should not amount to 125*l.*, and the lessees did not pay that sum in anticipation of future royalties, then the lessor should be at liberty at the end of one month from the expiration of such second three months, by notice in writing to annul and determine the agreement; or if within any six months after the expiration of such second three months the lessees did not pay to the lessor in royalties or in money the sums of money thereby respectively made payable, the lessor should be at liberty at the end of one month from the expiration of any such six months, by three months' notice in writing, to annul and determine the agreement, and so re-enter as for a forfeiture. It is clear, therefore, to my mind that the formal lease would have described the rent as payable at less intervals than a year. It would certainly be a most unbusiness-like arrangement to make it payable only yearly; and the stipulation is that 125*l.*, the aliquot part of 500*l.*, should be paid in the second quarter of the first year. I think that created a duty on the part of the lessees to pay oftener than once a year, and that the expanded lease would have provided for that. Then comes article 9, which

(a) After the close of the argument, Mr. Mackeson referred to the following cases,—*Cattley v. Arnold*, 1 Johnson & H. 651, and *St. Aubyn v. St. Aubyn*, 1 Dr. & Smale 611: and Mr. Clarke referred to *In re Markby*, 4 Mylne & Cr. 484.

contains the power of determining the agreement which we are called upon to construe. It provides that the lessees are to be at liberty "at any time hereafter" to determine the agreement, or the lease hereby agreed to be granted, and to abandon the works, on giving to the lessor six months' notice in writing of their intention so to do. Now, \*332] had the lessees a right under that article, according to the \*ordinary meaning of the words, to abandon the premises and so to put an end to their liability under the agreement by a six months' notice to expire at any period, or to expire only at the end of a current year of the tenancy? I am of opinion that the true construction is, that the six months' notice may expire at any time. All contracts are to be construed according to the intention of the parties; and, in construing a contract, you must take the words of the instrument and the surrounding circumstances existing at the time it is made. It seems to me to be a very material circumstance to consider in construing this contract, that it relates to the working of a mine. In such a case, the making of any profit from the mine depends entirely upon the continuance of the lode under ground. Every day's experience teaches us that the most reasonable expectations may be baffled by events which could not be anticipated; and so the adventurers are sometimes compelled to carry on the working at great loss. By this agreement, the lessees bind themselves to pay a dead rent of 1500*l.* a year for nineteen years: and to my mind it seems to be extremely probable that a person entering upon so hazardous a speculation in a new mining country would stipulate for a power to relieve himself at any time from so onerous an outlay, in the event of the ore failing. It is unnecessary to say that it is only in the event of failure that the lessees would be desirous of exercising this privilege; for, it stands to reason that this like any other commercial speculation would not be abandoned if it yielded a profit commensurate with the outlay. All these are matters which it is most material to consider in putting a construction upon this instrument: the landlord was to have a dead rent of 500*l.* a year for the first two years, and 1500*l.* a year afterwards, if the royalties produced no more; but the \*333] tenant was to have the option of putting an end to his liability by a six months' notice, that is, by paying 250*l.* or 750*l.*, as the case might be. The interests of the parties in mining adventures are not affected by the seasons, and therefore there is no analogy between a lease of mines and a lease of the surface: the ore is as accessible in winter as in summer. That being so, I can very well understand why the words "at any time hereafter" were introduced in the article which provides for the determination of the term and the abandonment of the works. Several cases have been cited where, subject to occasional exceptions, the general rule has been sanctioned, that, in the case of a tenancy from year to year, nothing being said about determining it, the holding can only be put an end to by a six months' notice expiring with a current year of the tenancy. Whatever is the usual course of business is tacitly understood and implied in all contracts. It is competent to the parties to make special terms,—to make the tenancy determinable at a three months' or a six months' notice, to expire at any time: but, in the absence of such special arrangement, the general presumption holds. Premises are let for

one year and so on for any number of years the parties may mutually agree: either party is at liberty to give the other a six months' notice that he will not let or take the land for the ensuing year. That is the meaning of the ordinary six months' notice to quit. Now, here, the parties never contemplated the creation of a tenancy from year to year, but a term of twenty-one years under a lease which was to contain, in addition to anything specially provided for therein, proper covenants for the effectual working of the said minerals, for the preservation, protection, and keeping in repair the said works, &c., and all other usual and customary clauses. No formal lease was ever executed, \*but the proposed lessees entered, and paid [\*334 rent; and, under these circumstances, if this had been the case of a lease of ordinary premises, they must be supposed to have agreed to hold as tenants from year to year subject to all the terms of the agreement so far as they might be applicable to a tenancy from year to year: and such an agreement would be a perfectly legal one if it contained a stipulation for the determination of the term by a notice expiring *at any time*, instead of in the usual manner, at the end of a current year of the tenancy. I think such an agreement may fairly be implied from the words of the instrument here: and, this being, as I before observed, an agreement for a lease of mining property, I see nothing unreasonable in such a stipulation. I would refer to the case of *Right d. Flower v. Darby*, 1 T. R. 159, where the subject was much discussed. It was contended on the one side, that, if the rule I have mentioned was to prevail in any instance, still there is a great difference between land and houses; that the same reasons which might induce the court to extend it to the former were not applicable to the latter; but, with respect to lands, there might be a hardship in suffering the landlord to oust the tenant in the middle of the year, by which he would be put to the inconvenience and expense of carrying the crops from off the premises, but no such reason could apply in the latter case, from the nature of the thing itself; and that, on the contrary, more inconvenience would ensue both to landlords and tenants from adopting the strict rule attempted to be imposed, than by adhering to that which seems originally to have prevailed, viz., of giving half a year's notice to quit, without reference to any particular period of the term.<sup>(a)</sup> But the whole court \*repudiate the distinction. Lord Mansfield says: "If there [\*335 be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was, to hold for a year. But then it is necessary for the sake of convenience, that, if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year: now, this is a notice to quit in the middle of the year, and therefore not binding, as it is contrary to the agreement." Ashhurst, J., says: "There is no distinction in reason between houses and lands, as to the time of giving notice to quit. It is necessary that both should be governed by one rule. There may be cases where the same hardship would be felt in

(a) See *Parker d. Walker v. Constable*, 3 Wils. 25, and *Throgmorton d. Wandley v. Whelpdale*, Hil. 9 G. 3, Bul. N. P. 96.

determining that the rule did not extend to houses as well as lands; as in the case of a lodging-house in London being let to a tenant at Lady-Day, to hold as in the present case: if the landlord should give notice to quit at Michaelmas, he would by that means deprive the lessee of the most beneficial part of the term, since it is notorious that the winter is by far the most profitable season of the year for those who let lodgings." And Buller, J., says: "It is taken for granted by the counsel for the plaintiff, that the rule of law which construes what was formerly a tenancy at will of lands into a tenancy from year to year, does not apply to the case of houses; but there is no ground for that distinction. The reason of it is, that the agreement is a letting for a year at an annual rent; then, if the parties consent to go on after that time, it is a letting from year to year. This reason extends equally to the present case: an annual rent is reserved here; and upon such a holding it has been determined that \*336] half a year's notice to quit is \*necessary. This doctrine was laid down as early as in the reign of Henry the Eighth.(a) The moment the year began, the defendant had a right to hold to the end of that year: therefore there should have been half a year's notice to quit before the end of the term." For the reasons I have before stated, I think there is no such presumption in the case of a mining lease, which is not affected by changes of season, but on the successful exploration of the underground strata, which may be carried on at any period of the year. Mr. Clarke's main argument was, that the rent was payable yearly, and that there was no power of apportionment. I am of opinion, however, that the 7th article does contemplate the apportionment of the sums payable under the agreement, because it expressly provides, that, in the event of certain sums not being paid in anticipation of royalties, at certain periods of three months and six months, the lessor may by a month's notice or a three months' notice put an end to the agreement, without prejudice to his rights thereunder for rent or otherwise. The parties, therefore, plainly contemplate the possibility of an abrupt determination of the term. There is no stipulation fixing the payment of rent by specific gales. It would seem to stand to reason, that, if the lessor had a right to determine the agreement under article 7, and chose to exercise that right, he would be entitled to an aliquot part of the 500*l.* or the 1500*l.* rent, as the case might be. If, therefore, an apportionment could be made in case of the determination of the tenancy by the lessor, I see no insurmountable difficulty in making it, if the determination is brought about by the act of the lessees. The royalties are payable *de die in diem*. The agreement provides for the payment of a dead rent of a given amount provided the royalties do not \*337] amount \*in the course of the year to so much; and a provision is also contained therein for applying the surplus royalties of one year to any deficiency that might happen in the next: but all that would be specially provided for by the more expanded instrument which was contemplated between the parties; and I do not see that any light would be thrown upon the question now before the court by raising a discussion upon this part of the agreement. For

(a) 13 H. 8, fo. 15 b.

these reasons, I am of opinion that the plaintiff is entitled to judgment.

WILLIAMS, J.—I have arrived at the same conclusion, but I am bound to say not without considerable doubt and difficulty. The first question to be determined, is, whether the tenancy from year to year which is to be implied from the occupation of the premises by the lessees and the payment and acceptance of rent, is subject to the stipulation in the 9th article of the agreement of the 19th of August, 1861, that the lessees shall be at liberty at any time hereafter to determine the agreement, or the lease thereby agreed to be granted, and to abandon the iron-works, on giving to the lessor six months' notice in writing of their intention so to do,—whether that means an absolute period of six months to expire at any time, and not with reference to the expiration of a current year. I do not think that question is altogether free from doubt, because I apprehend the rule as to the determination of the tenancy by notice is common to demises of mining property as well as to demises of land or houses or any other description of property. Although it has been judicially intimated that the rule originated in the notion of favouring agricultural tenants, I think similar inconveniences might follow in the case of other descriptions of tenants, if a different rule were held to prevail as to them. This seems to me to be the result of the ruling of the Court of King's Bench in the leading case of *Right d. Flower v. Derby*, 1 T. R. 159, to which my Lord has referred. Lord Mansfield and Buller, J., put it on the footing, that, where the old agreement is renewed, it is for a year, because it was a yearly tenancy before. "If," says Lord Mansfield, "there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was, to hold for a year." And Buller, J., says the reason of the rule is, "that the agreement is a letting for a year at an annual rent: then, if the parties consent to go on after that time, it is a letting from year to year." That being the principle, it may well be questioned whether the term contained in the 9th article of this agreement, that the lessees are to be at liberty to determine the tenancy on a six months' notice absolutely, is not inapplicable to a tenancy from year to year. However, I am inclined to think there is no real difficulty in that, because it evidently was in the contemplation of the parties to go on for a time under the agreement without having any more formal instrument: the language of the article is,—"*The lessees to be at liberty at any time hereafter to determine this agreement or the lease hereby agreed to be granted,*" &c. Upon the whole, I am of opinion that the words "*at any time hereafter*" are to be taken in the sense contended for by the lessees. If so, it follows that we must construe the 9th article in the same way as if the words had been inserted in a lease which we were called upon to construe. What, then, is the meaning of the words, "*The lessees to be at liberty at any time hereafter to determine this lease, on giving to the lessor six months' notice in writing of their intention so to do?*" Are they to be taken in their literal \*sense? If so, they are satisfied by a six months' notice to be given *at any time*. I take it to be clear, upon principle as well as on

authority, that, if the court is able to ascertain from the context and the general scheme of the lease that the parties by "six months' notice" meant a notice to expire at the end of the current year, they would be bound to ascribe that meaning to it, but that they would not be justified in so doing unless the context makes it clear that the parties so intended.

The question, then, resolves itself into this,—whether there is sufficient on the face of the agreement to demonstrate that it was the intention of the parties that the more enlarged construction should be given to the words "six months' notice." I think there is strong evidence that that was the construction intended. Many of the articles of the agreement seem to be framed in the contemplation that there never will be a broken year, except in the event of the landlord's taking advantage of the clause of forfeiture, article 7. In that case, no doubt, there would be a broken year: but, with that exception, it seems to me that there is strong evidence that the parties contemplated a tenancy which should go on to the end of the year. The reason I think so is this:—By article 2, certain royalties are to be paid by the lessees to the lessor. By article 3, in case the royalties should not amount to 500*l.* in each of the first and second years, or to 1500*l.* in the third or any subsequent year of the term, the lessees were to pay such a sum as with the royalties would make up those respective sums. So that, though the royalties are payable *de die in diem*, yet, if they should prove insufficient to cover the minimum rent, an account would have to be taken at the end of the year, and the lessees would have to make up such minimum rent. It may well \*340] be supposed that the \*parties really thought there would be sufficient royalties to cover the whole amount of the stipulated payments: but it must be borne in mind, in construing this agreement, as in construing wills and other documents, that the court is bound to look not only at what has actually happened, but also at what might have arisen, and to construe the instrument with reference to that. If the lessees, as they are called, were allowed to determine the agreement by a six months' notice at any time, there would be considerable difficulty in making up the accounts of the royalties to be paid and the allowances to be set off, so as to ascertain what was due to the lessor in respect of royalties or dead rent. So, as to the sleeping rent of 7000*l.* a year reserved for the use of the plant, &c., which by article 5 is subject to reduction if the profits realized should be less than 21,000*l.* per annum. Of course, no difficulty of that sort arises here, there having been no profits: but it might have happened that it was necessary to enter into minute calculations as to what was payable to the lessor with reference to the profits and other circumstances, and there might be great difficulty if the lessees were to be at liberty to determine the agreement by a six months' notice expiring at any undefined period of the year. But, as my Lord has said,—and I do not wish to dissent from the view he has taken,—that difficulty might be met by the insertion of proper covenants and stipulations in the formal lease when that lease came to be drawn up: and I think that is the only way in which it could be done; for, it is clear to my mind that the Apportionment Act of 4 & 5 W. 4, c. 22, does not

apply to a case of this kind, there being no determination of the interest of the landlord within the 2d section of that act.(a)

\*As far as the authorities go, I would only observe that Doe d. Pitcher v. Donovan, 1 Taunt. 555, does not appear to me to [\*341 be in point, because the tenancy there was a tenancy from year to year, and the case was decided with reference to that state of things. Assuming, as we must do upon this part of the argument, that this was a qualified tenancy from year to year by reason of the provision in the 9th article, the case does not appear to me to be governed by Doe d. Pitcher v. Donovan. That decision, however, is not without importance in reference to this case, inasmuch as it establishes that the construction of the words "quarter's notice" was to be governed by the intention of the parties as it was to be gathered from the [\*342 \*agreement and the surrounding circumstances. Doe d. King v. Grafton, 18 Q. B. 496 (E. C. L. R. vol. 88), has no application whatever to this case. The court there held, in effect, that there was no yearly tenancy at all. "Every case," says Wightman, J., "of an express agreement, as this was, must be decided on its own terms. 'At the yearly rent of 42*l.*, payable quarterly,' would indicate a yearly tenancy: but what follows is inconsistent with this: provision is made for paying the portion of a quarter to 24th June,"—the premises being let from the 19th of April,—“and then it is added, 'until one of the said parties shall give unto the other six calendar months' notice.' These are the effective words, and decide the construction of the agreement.”

I would only add that I do not feel at all pressed by the words of article 9, "at any time hereafter." Suppose the parties had agreed in so many words, that, at any time during the currency of the lease, the tenancy might be determined by the tenant's giving the *usual* notice, could any doubt have arisen? I see nothing inappropriate or anomalous in the reservation of a liberty at any time hereafter to determine the lease, if it was understood that the lessees were to give such a notice as a tenant from year to year is bound to give, but were to be at liberty to give it at any time during the term of twenty-one years for which the lease was to run.

The question still remains, whether, reading the words of the 9th article simpliciter, there is in the contents of the agreement enough

(a) This section enacts "that *all rents* service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this act), and all rents charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the united kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument) that shall come into operation after the passing of this act, *shall be apportioned* so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions, and other payments, being made."



to show that the more enlarged meaning should be given to the words "six months' notice," as Mr. Clarke suggests. I think we are bound to come to the conclusion, though I think there is strong evidence to show that the parties intended to use those words in the wider sense \*343] I have indicated, that the words were used in their ordinary \*sense: and upon these grounds I agree with the rest of the court that our judgment should be in accordance with the contention of the defendants.

WILLES, J.—I am of the same opinion. The words upon which we are called upon to put a construction are these,—“the lessees to be at liberty at any time hereafter to determine this agreement, or the lease hereby agreed to be granted, and to abandon the said iron-works, on giving to the lessor six months' notice in writing of their intention so to do.” Now, considering that it is the tenant who is to give notice, he is, of course, *primâ facie* to select the time at which to give it: and, as the words are “at any time,” he is, *primâ facie* to elect the time out of all time during the currency of the lease. Taking that clause alone, there is no doubt the lessees would be entitled to give notice of their intention to abandon the works at any time of the year, or on any day of the month or week, or at any hour of the day at which he could find the lessor, to give him notice. On the other hand, it is equally clear that the general words may be cut down by the language which is used in other parts of the instrument: and this is aptly illustrated by the case supposed by my Brother Williams, of the words “at any time hereafter” being followed by the words “as usual in the case of a tenancy from year to year,” or such-like words. In that case, the generality of the words “at any time hereafter” would be limited by the condition imposed by the subsequent words, and construed to mean such a notice as could ordinarily be given by a tenant from year to year, viz., a notice of six months to expire at the end of the current year. I entirely agree with my Brother Williams that the question to be determined here is, whether we can find upon the face of this document words to which we can \*344] and ought to \*give the same construction as the words the effect of which I have been considering. I do not think much weight is to be attributed to the suggestion that we should give the words of this agreement their ordinary, or, as it is sometimes called, their natural meaning, as, that the six months' notice should end with the year. The character of the agreement being so speculative, one would naturally expect that the lessees would stipulate for the option of putting an end to it at the expiration of any six months after they should have discovered that they were likely to make nothing by the mines: and, looking at its various provisions, I find it not to be contrary to the general scope and nature of them, that the notice should be one expiring at any period, at the tenant's option, rather than at the end of the current year; for the 7th article contemplates a notice being so given by the landlord under certain circumstances.

No doubt, the general object and intention of the parties to an agreement are important to be considered in arriving at the true construction of it: we must, therefore, look through the several clauses in order to see whether we can discover any such qualification of the general words as is contended for. In the first place, it is suggested

that there is a difficulty by reason of the absence of any provision for the payment of royalties or rent for a broken part of a year, and therefore, it is said, there is no mode of ascertaining the amount to be paid in that case. As to the first difficulty suggested, I must own I do not think it can arise; because, if article 9 is to be read, according to the ordinary meaning of the words, as applying to a notice to put an end to the lease in the middle of a quarter, there is in my opinion abundant language in the agreement to show the intention of the parties that the royalties or the substituted payments in \*anticipation of royalties, and the rent for the plant, &c., are [\*345 to be paid for such broken portion of a year or quarter. The reasons applicable to the payments on account of royalties and the rent for the plant, are somewhat different. By article 2, royalties are to be paid in respect of all ironstone, coals, and other minerals. Therefore, as soon as any minerals were raised, there would be royalties due in respect of them, the amount of which could be ascertained by reference to that article. Then comes article 3, which provides, that, for the first two years of the term, the lessees shall pay at the rate of 500*l.* a year, notwithstanding the royalties on the minerals obtained should fall short of realizing that sum. Construing that article conjointly with the 7th, it would seem that a fourth part of that sum, viz., 125*l.*, was to be payable each quarter: and it is clear from the facts stated in the special case, that that is the construction which the parties themselves put upon it. After the expiration of the second year, the payments on account of royalties were to be not less than 1500*l.* per annum. Then comes the average clause, article 4, by which the excess of royalties in one year was to be set against any shortcoming of the preceding year. The result of these three articles is this,—royalties are to be paid according to the quantity of minerals raised, so that they should not amount to less than the annual sums mentioned; but the lessees were to have the benefit of any excess in the royalties in one year to make up for a deficiency in the subsequent year. Nothing, as it seems to me, can be more easy than to apply that. The only possible difficulty which I see in making the calculation, in the event of the term being put an end to at any other time than the end of the year, would be with reference to the claim of the lessees under the average clause. They might have gone on paying dead rent in excess of royalties for \*several [\*346 years, and by putting an end to the holding, they would lose the chance of recouping themselves out of the increasing royalties of subsequent years. But that would be their business and their loss; and that is the only uncertain quantity in the calculation that I can discover. It seems to me, therefore, that there is no difficulty in applying this agreement, so far as regards the royalties and payments in anticipation of royalties, to a broken portion of a year.

Then, as to the rent payable for the plant. That, at first sight, would seem to present more difficulty. At one time it occurred to me that the only way of making an apportionment in respect of that rent of 7000*l.* a year, was by reference to the express provision in article 5, that the lessees are to have the right in any year of the demise in which the profits made by them from the works shall not amount to 21,000*l.*, to pay only so much of the said rent as shall be

equal to one-third of the profits of such year, and that, in the lease agreed to be granted, due provision should be made for securing the payment of the rent so reducible. But we cannot speculate as to what provisions a conveyancer would insert in the lease in reference to that object; and I think there is another mode of arriving at the conclusion that the fact of the 7000*l.* being paid yearly does not present any difficulty in the way of our adopting the construction we have arrived at of article 9, because, if article 5 is carefully looked at, it will be found that it is not a provision for a fixed rent of 7000*l.* a year: 7000*l.* is mentioned as the maximum; but it is to be reducible to a third of the profits in case they should be less than 21,000*l.* per annum. I could not at first account for the absence of any mention of the 7000*l.* a year in the case. But I presume that is the explanation of it. The parties did not think it worth while to raise the \*347] question as to a third of the \*profits. Profits, like royalties, distribute themselves; and the account might be taken just as in the ordinary case of a partnership. That being so, none of these clauses appear to me to present any difficulty in putting upon the words of article 9 the construction which generally they seem to require. Therefore we must construe the words "six months' notice" to mean either an absolute period of six months to expire at any time, or a six months' notice to expire at the end of a current year. In the latter case, it will be necessary to interpolate the words, "expiring at the end of one of the years of the tenancy," which we have no right to do, unless we can clearly see that it was the intention of the parties that it should be done.

I at one time thought that the meaning of article 9 might possibly be, that the notice contemplated was to be a notice expiring on some quarter-day corresponding with the day of the commencement of the demise, so as to make this a good notice for the 19th of February, though not for the 13th; and so one difficulty might be reconciled, inasmuch as the apportionment would have been made more simple. If, instead of "six months," the words had been "two quarters," it may be that we might have been justified in putting such a construction upon the agreement. But I do not see that we have any right to alter the language the parties have thought fit to use. We must take the words "six months' notice" as representing an absolute period of six months during any period of the currency of the lease. There are cases in which provisions have been introduced into agreements specially conferring upon one of the parties benefits which could not accrue to him unless the agreement were held to enure to the end of a year, and it has been insisted, therefore, that the engagement could only be put an end to \*348] at the expiration of the year. I do not, \*however, refer to these as having any very great bearing upon the question now before us. One of these was the case of *Parker v. Ibbetson*, 4 C. B. N. S. 346 (E. C. L. R. vol. 98). There, there was an agreement by which the plaintiff engaged to serve the defendant as agent or representative at a salary of 150*l.* per annum, and there was a proviso, that, in a given event, the plaintiff was to have at the end of the year a donation of 30*l.* to make up the salary to 180*l.* A yearly hiring being by the custom of the trade determinable by a month's notice at any time, this court held that there was nothing in the proviso to exclude the

application of the custom to the particular case. Another case of that class was the more recent one of *Nicholl v. Greaves*, *antè*, p. 27, where the plaintiff, a huntsman, sought to withdraw himself from the general rule applicable to the determination of the hiring of a menial servant, by the fact that a premature ending of his service would deprive him of certain contingent advantages stipulated for in his agreement, which could only accrue to him provided he were permitted to serve for the whole year. Taking the words here used in their ordinary and grammatical sense, I am of opinion that the defendants' construction is right. The result will be, according to the agreement of the parties in the question they have put to us, that the plaintiff will have judgment for the proportionate part of the 1500*l.* down to the 18th of February, 1864, and the defendants will be entitled to the costs.

BYLES, J.—I am of the same opinion. Originally, I must confess, I entertained considerable doubts: but, having considered the matter carefully, and heard the judgments of my Lord and my two learned Brothers, my doubts are removed. The question is, what is the meaning of the words "at any time hereafter," in the \*9th article [\*349 of the agreement of the 19th of August, 1861. Now, they are susceptible of three meanings,—first, their literal meaning, any month, day, or hour,—secondly, at any time which is usual in contracts between landlord and tenant; which interpolates the word "usual,"—thirdly, at any time which will end at a time when the rent becomes due; which would be to interpolate the word "convenient." Now, it seems to me that we are not at liberty to interpolate any words, but must construe the agreement according to the ordinary and grammatical sense of the words which the parties have used. The 7th article having provided for the events in which the lessor may determine the agreement or the lease thereby agreed to be granted, the 9th article provides that "the lessees shall be at liberty at any time hereafter to determine this agreement, or the lease hereby agreed to be granted, and to abandon the said iron-works, on giving to the lessor six months' notice in writing of their intention so to do." Now, that obviously cannot be read with reference to the ordinary notice applicable to a tenancy from year to year. That applies to a notice to be given by either party; whereas, this is a provision for a notice to be given by the tenant only. Further, it is a notice which is to put an end to the lease itself, which is to be for a term of twenty-one years, and not a mere tenancy from year to year. It seems to me, therefore, that, unless it will lead to some great and obvious inconvenience, the only construction we can put upon the words which the parties have used, is, their ordinary literal construction.

The difficulty which more especially oppressed me was this,—that, if the notice might be given at any time, without reference to the period of the commencement of the demise, it might be given so as to expire just one day before the rent became due, and thus \*(as [\*350 I at one time apprehended) the lessor might run the risk of losing his rent. But, on reference to the agreement, it will be found that there are two provisions which would make an apportionment a matter of contract between the parties. In the first place, there is the stipulation in article 1, that, "the lease shall contain, in addition to anything specially provided for herein, proper covenants for the

effectual working of the minerals, &c., and all other usual and customary clauses;" and it may be that under the peculiar circumstances of this lease such a clause would be usual and customary. In addition to this, in article 6, which provides for the reduction of the 7000*l.* rent, it is declared that, in addition to the lease agreed to be granted, due provision shall be made for securing the payment of the said rent to the lessor. Now, this would be a very ineffectual provision if it failed to provide for an apportioned rent. There is one point upon which I cannot quite agree with my Brother Williams. I am not quite satisfied that the Apportionment Act, 4 & 5 W. 4, c. 22, does not apply to this case. The 2d section enacts that all rents, &c., and all other payments of every description, shall be apportioned, on the determination of the interest by any means whatever. I must confess I should have thought this case fell within those very general words. Littledale, J.,—whose opinions, even when obiter, are always entitled to the highest respect,—says in *Oldershaw v. Holt*, 12 Ad. & E. 590 (E. C. L. R. vol. 40), 4 P. & D. 307, "I doubt if the statute as to apportionment applies in any case where the landlord ceases to be so by his own act,"—implying, as it seems to me, that, where the tenancy is put an end to by the act of the tenant, there would be a right of apportionment. I am, therefore, by no means satisfied that there could be no apportionment here. There is but one more remark \*351] which I wish to make, and that \*is with reference to the 7000*l.* rent. It is true, the payment of that is to depend upon and be measured by the amount of the profits. If the profits be nil, the rent for the plant is to be nil. But, nevertheless, it is to be observed that this is a mining-lease, and leases of that kind of property necessarily contain very stringent and onerous provisions to bind the tenant; and therefore it is more necessary that he should have special provisions in order to relieve himself from the burthen of an adventure which turns out profitless to him.

On these grounds, and giving to the considerations which have been presented by my Brother Williams all the weight which anything that falls from him so eminently deserves, I now entertain no doubt that our decision ought to be (substantially) for the defendants.

The formal judgment will be in favour of the plaintiff for the rent due down to the expiration of the six months' notice, without costs, and for the defendants for the costs. Judgment accordingly.

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\*352] \*PEARSON v. GÖSCHEN and Others. June 23.

1. M'C., B. & Co. chartered the plaintiff's ship *Hooyland* for a voyage from Glasgow to Porto Rico, and back to a port in the united kingdom with a full and complete cargo,—freight to be paid at the rate of 4*l.* 10*s.* per ton on the homeward cargo, as follows, viz., 350*l.* by four months' bills on London on the sailing of the vessel from Glasgow, and the balance half in cash and half by bills on delivery of the homeward cargo; and it was provided that, "for the security and payment of all freight, *dead freight*, and demurrage and other charges, the master and owners should have an absolute lien and charge on the said cargo and goods laden on board," and that "*bills of lading should be signed by the master as presented to him, and at any rate of freight, without prejudice to the charter-party.*" Arrived at Porto Rico, the *Hooyland* received from the agents of the charterers, L., C. & Co., 498 hogsheads of sugar, for which the

master signed a bill of lading making the goods deliverable to M'C., B. & Co., or their assigns, they paying freight at the rate of 40s. per ton.

L., C. & Co., having received notice that M'C., B. & Co. had stopped payment, refused to ship any more goods, and demanded a return of the 498 hogsheads already shipped or a fresh charter. The master, on appeal to the British vice-consul, was informed that by the Spanish law he was compellable to restore the cargo to the shippers or to sign a fresh charter; and, acting under this advice, he consented to sign a new charter for the whole cargo at a freight of 30s. per ton. The bills of lading for the 498 hogsheads were then destroyed, 108 hogsheads more put on board, and a fresh bill of lading given for the whole, making them deliverable to the defendants or their assigns on payment of the 30s. per ton freight, one-half in cash on delivery, the remainder by four months' bills. The master did all this under protest. The ship was not fully loaded.

On the arrival of the *Hooyland* in London, the plaintiff claimed a lien upon the entire cargo for the freight mentioned in the original charter-party:—

Held, that the 498 hogsheads having been shipped by L., C. & Co., under the first charter-party, as agents and on account of M'C., B. & Co., the charterers, and the master having no authority to alter that contract, the plaintiff was entitled to the full amount of the charter freight upon these: but that, as to the 108 hogsheads shipped by L., C. & Co., after the notice of the failure of M'C., B. & Co., the master, acting in the interest of his owner, was authorised to enter into the new contract, and consequently the plaintiff was only entitled to the stipulated rate of freight (30s. per ton) upon them.

2. And held, that the plaintiff could not claim, as "dead freight," the difference between the sum he would be entitled to, calculated on the above principle, and the sum which the vessel would have earned if a *full cargo* had been put on board at the freight originally stipulated for.

THIS was an action brought by the plaintiff to recover from the defendants the sum of 1265*l.* 16*s.* 5*d.*, alleged to be owing for freight and demurrage of the plaintiff's ship the *Hooyland*.

The declaration stated, that, before and at the time of the making by the defendants of the promise thereafter mentioned, the plaintiff was the owner of a certain ship called the *Hooyland*, and the plaintiff had theretofore chartered the said ship to certain persons carrying on business under the firm of M'Cormick, Ball & Co., to load a cargo at Glasgow, and therewith proceed to a safe port in Porto Rico, and there deliver the said cargo; after which the said ship was again to be made ready, and there, or at any other safe port in <sup>the</sup> same island, load from the said freighters or their factors a <sup>[\*358</sup> *full and complete cargo* of sugar or other lawful merchandise, and return therewith to a port of discharge in the united kingdom, as provided in the charter-party, and deliver the same to the said freighters or their assigns, freight for the same being paid at and after the rate and in the manner provided by the said charter-party; and it was also by the said charter-party agreed, that, for the security and payment of all freight, dead freight, and demurrage and other charges, the master and owners should have an absolute lien and charge on the said cargo and goods laden on board. That, afterwards, the said ship sailed from Glasgow aforesaid under the said charter-party with a certain cargo, and delivered the same at a certain port in Porto Rico, and thence proceeded to another port in the said island according to the said charter-party, and there loaded from the factors of the said charterers a large quantity of sugar, and, being so loaded, sailed and proceeded therewith to a port of discharge in the united kingdom, and was there ready to deliver the same pursuant to the terms of the said charter, and upon payment to the plaintiff of the freight for the same, and also a certain sum of money due for dead freight and demurrage according to the said charter, amounting to a large

sum of money, for security and payment of which the plaintiff had according to the aforesaid provisions a lien on the said cargo; and the plaintiff had put a stop on the said goods for the said amount of his said claim: That thereupon the defendants claiming to be entitled to have the said goods delivered to them as the consignees thereof upon payment of a much smaller sum of money than the said amount claimed by the plaintiff as due to him as aforesaid, and disputing the right of the plaintiff to have a lien on the said goods as against them the \*354] defendants for the said large amount of money, in consideration of the plaintiff delivering the said goods to the defendants, the defendants promised and undertook to pay to the plaintiffs such further sum (if any) as the plaintiffs might by law be entitled to a lien for on the said goods as against them the defendants, over and above the said smaller amount admitted by the defendants to be due as aforesaid: And that all conditions were fulfilled necessary to entitle the plaintiff to be paid by the defendants a large sum of money on account of the said freight, dead freight, and demurrage, according to the said promise and undertaking, being a sum over and above the said smaller amount: yet that the defendants had not paid the same.

There was also a count for money payable by the defendants to the plaintiff for money promised and agreed to be paid by the defendants to the plaintiff in consideration of the plaintiff delivering to the defendants out of a certain ship of the plaintiff certain goods then carried in the said ship, and for the freight of which goods the plaintiff had a lien thereon. Claim, 3000*l*.

The defendants pleaded,—first, as to the first count, that the plaintiff had not chartered the said ship upon the terms alleged,—secondly, to the first count, that the said ship did not load from the factors of the said charterers any sugar as in the said count alleged,—thirdly, to the same count, that the plaintiff was not by law entitled to a lien on the said goods as against the defendants for any further sum beyond the amount for which the plaintiff accepted the defendants' check as in the first count alleged,—fourthly and fifthly, to the money counts, never indebted, and payment. Issue thereon.

The cause came on for trial before Erle, C. J., at the sittings in London after Hilary Term last, when a \*355] verdict was taken by consent for the plaintiff, for the amount claimed, subject to the opinion of the court upon the following case:—

1. The plaintiff is a shipowner residing and carrying on business at Glasgow; and the defendants carry on business as merchants in London, under the style or firm of Frühling & Göschen.

2. On the 17th of October, 1862, the plaintiff chartered the ship Hooyland to Messrs. Charles Thorburn & Co., of Glasgow, for a voyage for the round from Glasgow to any safe port at Porto Rico and thence back to a port in the united kingdom. According to the terms of the charter-party, the freight for the voyage was to be at the rate of 4*l*. 10*s*. per ton upon the homeward cargo delivered, and to be paid as follows, viz. 350*l*. by approved bills at four months' date, payable in London, on sailing of the vessel from Glasgow, and the balance, one-half in cash on right delivery of the homeward cargo at port of discharge, and one-half by approved bills on London at four months' date at same time. The disbursements of the vessel at

Porto Rico were to be paid by the charterers' agents, in full of which 100*l.* was to be deducted from the freight: forty-five working days were to be allowed for discharging and loading at Porto Rico and waiting orders at Queenstown or Falmouth, and twenty-five working days for loading at Glasgow, to commence on the 27th of October then current, and ten days on demurrage over and above the said laying days, at 6*l.* per day, to be paid day by day as the same should become due: And it was agreed, that, for security and payment of all freight, dead-freight, demurrage, and other charges, the master and owners were to have an absolute lien and charge on the said cargo or goods laden on board: Bills of lading to be signed by the master as presented to him, and at \*any rate of freight, without preju- [\*356  
dice to the charter-party.

3. This charter was made by Messrs. Thorburn & Co., as agents for Messrs. M'Cormick, Ball & Co., of Porto Rico.

4. The Hooyland received her outward cargo at Glasgow, and, on the 1st of December, 1862, set sail for the port of Arecibo in Porto Rico, having been kept on demurrage at Glasgow five days, which at 6*l.* per day would amount to 30*l.*

5. The Hooyland arrived at Arecibo on Saturday, the 10th of January, 1863; and, after some delay in unloading, owing to bad weather, the discharge of the cargo was completed at another port called San Juan on the 13th of March.

6. At San Juan, the captain of the Hooyland was directed by the charterers to proceed to the port of Ponce, another port in Porto Rico, for his homeward cargo, and to address himself there to the charterers' agents, Messrs. Lohse, Cortada & Co., who would ship the homeward cargo.

7. The captain proceeded accordingly to Ponce; at which place he arrived on the 23d of March, and at once reported himself to Messrs. Lohse, Cortada & Co., according to his instructions from the charterers; and he put into their hands a copy of his charter, which they read. He also inquired of them how soon the homeward cargo would be ready, and they replied that the cargo was then ready.

8. As soon as the discharge of the ballast then in the vessel was completed, the shipment of the homeward cargo was commenced. Four hundred and ninety-eight hogsheads and forty-nine barrels of sugar, marked M.C.B., were loaded on board, and a bill of lading for the same signed and delivered by the captain to Messrs. Lohse, Cortada & Co., at a freight of 2*s.* per cwt. payable on delivery in the united kingdom.

\*9. The further shipment of cargo then ceased; and, after [\*357  
a delay of some days, during which the captain was applying for the remainder of the cargo, Messrs. Lohse, Cortada & Co. informed him that Messrs. M'Cormick, Ball & Co. had suspended payment, and that they could not ship any more cargo on account of their failure; and they also required him to discharge and return to themselves the cargo already shipped, and for which he had signed a bill of lading as above stated.

10. The captain refused to discharge or return any part of the cargo which he had received on board. Messrs. Lohse, Cortada & Co. thereupon told him that he would be compelled to discharge his



cargo or sign another charter. They then again required him either to sign a new charter with them, or to discharge the cargo, and threatened in the event of his refusal to compel him to do so.

11. At this stage of the proceedings, the captain attended with one of the firm of Lohse, Cortada & Co., before the British vice-consul, in order to obtain his opinion; who told him that by the Spanish law he would be obliged to sign a new charter or to discharge his cargo, and advised him to sign a fresh charter.

12. The captain had in the mean time written, at the request of Lohse, Cortada & Co., to M'Cormick, Ball & Co., stating what had taken place, and received from them the following reply:—

"Arecibo, P. R. April 10th, 1863.

"Sir,—We regret to be compelled to inform you that we have declared our suspension of payments, and are in consequence unable to provide you with your return cargo of produce or assume any further responsibility in the matter. You are therefore at liberty to act as you please, and consider most to the benefit of your owner's interest. We hope, however, \*you will be able to effect some  
\*358] arrangement in Ponce, which may diminish as much as possible the very heavy loss which will unfortunately fall upon our friends concerned in this affair. In doing this, we feel assured that you will meet with the best advice and every assistance from Messrs. Lohse, Cortada & Co.  
M'CORMICK, BALL & Co."

13. Thereupon the captain, after protesting against the proceedings of Messrs. Lohse, Cortada & Co., entered into a new charter-party with them, by which the Hooyland was chartered for a voyage from Ponce to Queenstown or Falmouth for orders, to a port of discharge in the united kingdom, at a freight of 30s. per ton.

14. All the parts of the bill of lading signed under the first charter were destroyed by Messrs. Lohse, Cortada & Co.

15. Messrs. Lohse, Cortada & Co. then proceeded with the loading, and shipped a further quantity of sugar, viz., one hundred and eight hogsheads and eight barrels, making the whole amount six hundred and six hogsheads and fifty-seven barrels. The loading was finally completed on the 21st of April, 1863, and a bill of lading signed for the whole quantity, at 30s. per ton, payable on delivery in London.

16. On the 22d of April, 1863, the captain addressed the following letter to the plaintiff:—

"Barque Hooyland, Ponce, Porto Rico.  
22d April, 1863.

"Adam Pearson, Esq.

"Sir,—I am sorry to inform you, that, after all the delay and trouble we have had in this Island, that M'Cormick, Ball & Co. have stopped payment. I got notice from the agents here that they were  
\*359] unable to provide a homeward cargo for the Hooyland. I \*having on board at the time four hundred and ninety-eight hogsheads and forty-nine barrels of sugar shipped by Messrs. Lohse, Cortada & Co., of this port, as soon as they got notice of M'Cormick, Ball & Co.'s failure, they claimed the cargo, and wanted me to discharge it or sign a fresh charter. I refused to do either. I went to the British consul, and he told me I would be obliged to discharge the cargo or comply with their request. I would do nothing until I

heard from M'Cormick. An express was sent to Arecibo, which took six days to go there and back. The letter I enclose; so, what could I do rather than discharge the cargo? I noted a protest against the charterers for non-performance of the agreement, and had to accept a charter at 1*l*. 10*s*. per ton, to call at Falmouth for orders.

"We are now loaded, and will sail to-morrow morning. We have on board six hundred and six hogsheads and fifty-seven barrels: we could have stowed about one hundred more barrels, but they had no more to give me. We have to pay all our expenses here, drogherage of this cargo, and port-charges. I had to buy some beef and bread here. I was afraid of being short on the passage.

"JOHN M'ALLEY."

17. With the above cargo, the ship was not fully loaded; there being space for not less than one hundred barrels of sugar in addition: and there was a deficiency of ninety-three barrels upon the quantity guaranteed to be shipped by the original charter-party; the freight of which, at the rate of 4*l*. 10*s*. per ton, would have been 35*l*. 13*s*. 8*d*.

18. The ship was detained at Porto Rico in discharging her outward cargo and loading her homeward cargo eight days beyond the time allowed by the original charter-party, which at 6*l*. per day makes a claim of 48*l*. for demurrage there.

\*19. Previously to the suspension of M'Cormick, Ball & Co., [360 as above mentioned, they had expended 140*l*., according to the following account:—

"Port charges and ordinary disbursements of the ship at Aquadilla, San Juan, and Arecibo, up to the 24th of March, 1862,	\$492.50	£100 0 0
"Cash to captain, about	\$103	
"Provisions	64	
"Fine on account of error in manifest	26	
Up to the 24th of March	195	= 40 0 0

The above sums were paid by Messrs. M'Cormick, Ball & Co., who signed at foot of the accounts an order of transfer to Messrs. Lohse, Cortada & Co., in the following terms,—

"Pay to Messrs. Lohse, Cortada & Co., value in account.

"M'Cormick, Ball & Co., Arecibo.

"March 24, 1863."

The captain subsequently, at Ponce, on the 15th of April, 1863, certified these accounts as correct, and to be deducted from his homeward freight.

20. Messrs. Lohse, Cortada & Co., after the ship arrived at Ponce, paid the following sums:—

"For lighterage and loading the whole of the sugar	about 50 <i>l</i> .
"For ship's disbursements	about 26 <i>l</i> .
"Cash to captain, and provisions	about 35 <i>l</i> .—111 19 0

To this they added the two first-mentioned accounts transferred to them as above stated, and took the captain's receipt for the whole 251*l*. 19*s*. referred to in the next paragraph of the case.

21. On the back of the bill of lading finally signed by the captain

as above mentioned, he was required to sign and did sign the following receipt,—

"Received from Messrs. Lohse, Cortada & Co., on account of the within freight, the sum of 251*l.* 19*s.* sterling; and furthermore declare that my vessel is despatched within the time agreed, and that I have

\*361] \*no claim whatever for demurrage, dead-freight, &c.

"Ponce, 22d April, 1863.

"JOHN M'ALLEY."

22. The ship sailed on her homeward voyage on the 22d of April, 1863, and called in due course for orders at Falmouth, where she was detained one day on demurrage, waiting for orders. The captain then, having received orders from the defendants, proceeded to London as his port of discharge, where he arrived on the 6th of May, 1863.

23. At this time, the plaintiff had received the sum of 350*l.* payable on the sailing of the vessel from Glasgow according to the provisions of the original charter-party.

24. The freight upon the 498 hogsheads and 49 barrels shipped in the first instance at Ponce, and for which the bill of lading afterwards destroyed was given, would amount at the rate of freight in that bill of lading to the sum of 520*l.* 1*s.* 6*d.*; and the freight for the residue of the cargo afterwards shipped, at the rate of the original charter-party, namely at 4*l.* 10*s.* per ton, would amount to the sum of 253*l.* 6*s.* 8*d.*, and at the rate of 40*s.* would amount to the sum of 112*l.* 11*s.* 8*d.*, and at the rate inserted in the bill of lading for the same, namely 30*s.*, to the sum of 84*l.* 8*s.* 9*d.*

25. The freight for the whole cargo shipped, namely the 606 hogsheads and 57 barrels, at the rate of freight mentioned in the first charter, would amount to 1423*l.* 18*s.* 7*d.*; and, at the rate of freight mentioned in the second charter and in the bills of lading held by the defendants, would amount to the sum of 474*l.* 9*s.* 10*d.*

26. The above cargo was consigned by Messrs. Lohse, Cortada & Co. to the defendants as their agents for the sale of the same on their account; and they forwarded the bills of lading to the defendants for that purpose.

\*362] \*27. The defendants were holders of the bills of lading as agents for Messrs. Lohse, Cortada & Co., and for the above purpose, when the plaintiff, having received intelligence of the above circumstances, and before the arrival of the cargo, caused the following letter to be sent to the defendants:—

"London, 16 May, 1863.

"Messrs. Frühling & Göschén.

"Gentlemen,—Being advised that the cargo of the Barque Hooyland, from Porto Rico, is consigned to you, we hereby give you notice that we hold a lien upon the same for amount of freight, dead-freight, and demurrage, in terms of charter-party made in Glasgow the 22d October, 1862, between the owner of the said vessel and the agents of Messrs. M'Cormick, Ball & Co., of Porto Rico; and further give you notice not to part with said cargo until same is released from the claim now made by us above.

"SPYER & HAYWOOD, agents for the owner of the barque Hooyland."

28. The cargo was afterwards landed into the docks, and a stop

put upon the same by the plaintiff for his claim on account of freight and demurrage.

29. The defendants were willing to pay the amount of the freight according to the bill of lading held by them, less the above-mentioned sum of 257*l.* 19*s.*, which appeared by the endorsement at the back of the bill of lading to have been paid on account of the freight, amounting with such deductions to 225*l.*: and they have since paid this amount into court, and no question arises upon it. The plaintiff, however, refused to give up the cargo upon the payment of such sum.

30. The defendants afterwards wrote to the plaintiff the following proposition:—

\*“London, 4th Nov., 1863.

“If you will be good enough to withdraw your stop on the [\*363 cargo per Hooiland, we undertake to hold ourselves responsible to you for your claim, in the event of your being able to establish your lien on the cargo for the freight and demurrage due under the original charter-party; and any proceedings at law or equity which would be competent to you while the sugars were on shipboard or under stop shall be equally competent against us. We are, of course, ready to pay the 30*s.* freight under the new charter-party.”

31. The plaintiff acceded to this proposition, and the stop was accordingly withdrawn, and the cargo delivered to the defendants.

32. It was agreed that the court should draw such inferences of fact as a jury might draw.

The questions for the opinion of the court were,—First, whether the plaintiff was entitled to recover against the defendants any further sum of money than the said sum of 225*l.* paid into court:—secondly, if so, which of the above-mentioned sums of money the plaintiff was entitled to recover beyond the said sum of 225*l.*

If the court should answer the first question in the negative, judgment was to be entered for the defendants; but, if in the affirmative, then judgment was to be entered for the plaintiff for such sum as the court should find, in answer to the second question, the plaintiff was entitled to over and above the said sum of 225*l.*

*Watkin Williams* (with whom was *Lush*, Q. C.), for the plaintiff(a)—The facts are shortly these,—The \*plaintiff chartered the [\*364 Hooiland to M'Cormick & Co., of Porto Rico, for a voyage from Glasgow to Porto Rico and back to England, at a freight of 4*l.* 10*s.* per ton on the homeward cargo (no freight being payable for the voyage out), the freight to be paid 350*l.* by a four months' bill on London on the sailing of the vessel from Glasgow, and the balance on delivery of the homeward cargo at the port of discharge, one half in cash, the other half by approved bills on London at four months' date; and it was agreed that the master should sign bills of lading at

(a) The points marked for argument on the part of the plaintiff were as follows:—

“1. That the captain had no authority to substitute a fresh charter-party and bills of lading, and that the freight, &c., is to be calculated according to the original charter-party and bills of lading:

“2. That, so far as relates to the cargo shipped before the failure of M'Cormick, Ball & Co., the freight is according to the bills of lading signed for that cargo:

“3. That, if the plaintiff is bound by the second charter-party, the defendants cannot claim the benefit of any advances made under the first charter-party.”

any rate of freight, without prejudice to the charter-party. Arrived at Arecibo, the captain was directed by the charterers to proceed to Ponce, there to receive his homeward cargo from Lohse, Cortada & Co., their agents. At Ponce the captain received from Lohse, Cortada & Co. 498 hogsheads and 49 barrels of sugar (about four-fifths of a full cargo), for which he signed bills of lading at 40s. per ton, payable on delivery in London. The charterers, M'Cormick, Ball & Co., having stopped payment, Lohse, Cortada & Co. not only refused to ship any more cargo, but demanded the unshipment of that already on board: and ultimately the captain, acting under a species of duress, consented to sign a fresh charter-party to Lohse, Cortada & Co., and at the same time, cancelling the former bill of lading, to give them a new bill of lading making the whole cargo deliverable to their assigns, the now defendants, on payment of freight at 30s. per ton. On the arrival of the ship \*365] in London, the plaintiff claimed the entire chartered freight; and the defendants offered to pay the freight stipulated for by the bills of lading which they held. The defendants also claimed a right to deduct 251l. 19s. in respect of advances and disbursements before and after the second charter-party was signed. This they clearly are not entitled to. [WILLIAMS, J.—How would the matter stand if you succeeded in establishing that the plaintiff is entitled to the freight under the original charter-party to the extent of the sugars put on board before the notice of M'Cormick, Ball & Co.'s insolvency?] The plaintiff claims 4l. 10s. per ton upon these, or, failing that, 40s. per ton, and 30s. per ton for the sugars subsequently shipped by Lohse, Cortada & Co., on their own account. As to the original freight, the charterers were clearly liable: for their convenience, the charter-party contains a stipulation that the master may sign bills of lading at any rate of freight, but without prejudice to the charter-party. The result is, that, unless the bills of lading are in the hands of a bonâ fide holder for value, that provision has no operation at all. So long as they remain in the hands of the charterers or their agents, the original contract remains unaffected. That is precisely the position of things here. The authorities upon this subject are clear: see *Kirchner v. Venus*, 12 Moore's P. C. 361; *Shand v. Sanderson*, 4 Hurlst. & N. 331. [WILLES, J.—To which you may add a case in this court of *Kern v. Deslandes*, 10 C. B. N. S. 205 (E. C. L. R. vol. \*366] 100). (a) Here, the bill of lading was held by persons \*who had notice of the terms of the charter-party. WILLIAMS, J.—The plaintiff will be content to take 4l. 10s. per ton in respect of the sugars first put on board, and 30s. per ton for the rest?] Yes.

*Sir George Honyman* (with whom was *F. M. White*), for the defendants.—The plaintiff is only entitled, as against these defendants, to the

(a) By a charter-party which was negotiated by A. as agent of B., the charterer (B.) engaged to pay a lump-freight of 735l. for a voyage to the coast of Africa and back to London, payable in cash on correct delivery of the return cargo: and the charter-party contained the following clause,—“The master to sign bills of lading at any rate of freight, without prejudice to this charter.” B., the charterer, shipped certain oil on his own account for London, for which the master signed a bill of lading making the oil deliverable to A. or assigns, “he or they paying freight for the said goods as usual.” This bill of lading B. endorsed to A. in part payment of advances made by him on the purchase of the outward cargo. It was held that, A. having notice of the terms of the charter-party, the owner was entitled to a lien on the oil for the entire charter freight.

freight mentioned in the bill of lading given by the master to Lohse, Cortada & Co., viz. 30s. per ton. The original charter-party remains uncanceled. Upon the fact of M'Cormick, Ball & Co.'s failure becoming known, Lohse, Cortada & Co. claimed to exercise the right which the Spanish law gives to an unpaid vendor to stop in transitu the goods which had already been shipped. The captain, doing the best for the interests of his owner, in order to avoid the unloading of the cargo, consented to enter into a fresh bargain with Lohse, Cortada & Co. [WILLES, J.—The case does not state that the Spanish law gave the shippers the right to demand the redelivery of the 498 hogsheads and 49 barrels: and it is in the highest degree improbable that it should do so. WILLIAMS, J.—The contract was made in England, and was to be performed in England.] Not the contract with Lohse, Cortada & Co. for the shipment of the sugar at Ponce. A sale of goods by a Spanish merchant in a Spanish port must be subject to the Spanish law. [WILLIAMS, J.—There \*is nothing upon the face of the special case to show that the sugars shipped were sold by Lohse, Cortada & Co. to M'Cor- [\*367 mick, Ball & Co. On the contrary, they appear to have been shipped by them as agents for the charterers.] The right to demand redelivery of goods was recently discussed in this court in *Blasco v. Fletcher*, 4 C. B. N. S. 147 (E. C. L. R. vol. 93). [WILLES, J., referred to *Curling v. Long*, 1 Bos. & P. 634.] The right of an unpaid vendor to stop goods in transitu is superior to the lien of the carrier: *Oppenheim v. Russell*, 3 Bos. & P. 42; *Smith v. Goss*, 1 Campb. 282; *Blackburn on the Contract of Sale* 262. [WILLES, J.—In *Oppenheim v. Russell*, the claim of lien was for the carrier's general balance: and in *Smith v. Goss*, the question did not arise between the vendor and the carrier.] In *Thompson v. Small*, 1 C. B. 328, a ship was chartered for a voyage from London to Sydney, the charterer to have the entire use of the ship, and to pay the owner 1600*l.* in London in two months. The ship cleared at the Custom House. The charterer bought of the plaintiff goods to be paid for before the ship left London; and the plaintiff delivered the goods on board, and took the mate's receipt for them. Before the ship was ready to sail, the charterer was unable to pay for the goods (though not bankrupt nor taking the benefit of the Insolvent Debtors Act), and the plaintiff thereupon gave notice to the captain to redeliver them, and, on his refusal, made an arrangement with the charterer, and again applied to the captain in the charterer's name for the redelivery, offering to pay all reasonable charges. The captain having refused to redeliver, it was held that the shipowner had no lien upon the goods, but that the charterer had a right, as between himself and the shipowner, to take the goods out of the ship, at all events until the stipulated sum had become due, and that the captain was therefore liable \*in trover. [WILLES, J.—That was a very peculiar case. There the freight was a [\*368 lump sum payable two months after the sailing of the vessel. It could not create a lien, at all events until the freight became due. Now it is doubted whether it would even when due. This court on one occasion treated such a stipulated sum as freight.(a) But the true key to the

(a) *Gledstanes v. Allen*, 12 C. B. 202 (E. C. L. R. vol. 74).

decision in *Thompson v. Small* is given in *Kirchner v. Venus*, 12 Moore's P. C. 361. Where parties, instead of trusting to the general rule of law with respect to freight, make a special contract for a payment which is not freight, it must depend upon the terms of that contract whether a lien does or does not exist. When the contract made gives no lien, a court of law will not supply one by implication.] The shippers of the sugar might have refused to put it on board if they had known of the stoppage of M'Cormick, Ball & Co. They insisting upon having it unshipped when they did receive intelligence of the event, the master goes to the British vice-consul; and, being advised that he may be compelled to comply with that demand, acting as a free agent, he elected to adopt the course which he deemed best for the interest of his owner, and entered into a new contract with the shippers under which he engaged to bring the sugars home at a freight of 30s. per ton. What passed at Ponce was exactly the same as if the goods had been landed, and reshipped under the new charter and bill of lading. At all events, the plaintiff had no right to detain these sugars for more than the original bill of lading freight, viz., 40s. per ton. They were shipped upon the faith of a clause in the charter-party empowering the master to sign bills of lading at any rate of freight. [WILLIAMS, J.—Lohse, Cortada & Co. were aware of the existence of the charter-party by which the owner was entitled \*369] to \*freight at 4l. 10s. per ton.] True: but they were also aware of the power reserved to the master to sign bills of lading at a lower rate. In *Foster v. Colby*, 3 Hurlst. & N. 705, S. & W. chartered a ship from Liverpool to Calcutta and home for the sum of 7000l., "the freight to be paid 1250l. on the vessel clearing from Liverpool, and 1000l. on delivery of the outward cargo at Calcutta, the remainder in cash two months from the vessel's report inwards, and after right delivery of the cargo, &c.; the master to sign bills of lading at any rate of freight required, without prejudice to this charter-party: the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage." There were provisions for payment of the freight in cash on delivery of the cargo, if the cargo was delivered abroad. S. & C., who were the charterers' agents at Calcutta, having made advances to disburse the vessel, shipped a quantity of linseed, for which the captain signed bills of lading deliverable to their order or assigns on payment of freight at 5s. per ton, the current rate being 5l. 10s. Against this shipment, S. & C. drew a bill of exchange, and endorsed and delivered it, together with the bill of lading, for value. It was held, that, assuming the charter-party to have created a lien for the charter-party freight against the charterers, a *bonâ fide* endorsee of the bill of lading, without notice of the charter-party, was entitled to the linseed on payment of the bill of lading freight. "If," said Pollock, C. B., "a shipowner so conducts his business as to permit the master to sign bills of lading at a lower freight than that payable by the charter-party, in consequence of which parties are induced to make advances on such bills of lading, the shipowner is bound. It is said, that, from the small amount of freight mentioned in the bill of lading, the endorsee must \*370] have had notice that \*the sum named was not the true freight for the goods, that suspicions should have been excited, and

that it ought to have been assumed that the parties did not mean what they said. But, in a court of law, we must presume that persons who sign mercantile documents mean what they say." And Bramwell, B., says: "The bank,"—the consignees of the bill of lading,— "claims to be owner of the goods, and by the bill of lading it appears that the owner is to have them on payment of 5s. per ton. It is a monstrous proposition, that, when a person purchases goods upon the faith of a document showing that he is entitled to the possession of them on payment of a particular sum, the party who signed that document may say, 'I did not mean what I wrote, but I am entitled to something more.' But no one is bound to suppose the other means something contrary to what he has said." And in *Shand v. Sander-son*, 4 Hurlst. & N. 381, the like doctrine was laid down. [WILLIAMS, J.—In those cases the question arose between the shipowner and an assignee for value. Different considerations arise as between the shipowner and the charterers.] As to the sugars subsequently shipped, there can be no question but that the defendants were entitled to have them on payment of the bill of lading freight. [WILLIAMS, J.—As to that we are with you.] The defendants are also entitled to deduct the disbursements and expenses mentioned in the case.

*Williams*, in reply, conceded that the 108 hogsheads and 8 barrels were deliverable on payment of the 30s. freight: but he insisted that, by reason of the clause in the charter-party which provided, that, "for security and payment of all freight, *dead freight*, demurrage, and other charges, the master and owners were to have an absolute lien and charge on the said cargo or goods \*laden on board," the plaintiff was entitled to a lien in respect of a full imaginary [\*371 cargo at 4l. 10s. per ton, deducting the 30s. per ton for the sugars shipped under the second contract. [WILLIAMS, J.—There is no implied lien for dead freight; and the expression "dead freight" is wholly inapplicable to the claim here: *Phillips v. Rodie*, 15 East 547; *Birley v. Gladstone*, 3 M. & Selw. 205.]

WILLIAMS, J.—I am of opinion that the plaintiff is entitled to recover in this action. The first question submitted for our consideration is, whether the plaintiff is entitled to recover against the defendants any further sum than the 225l. paid into court. I am of opinion that he is: but it is unnecessary for us now to state the exact amount to which he is entitled; and it will be enough for us to state the principle, and the parties can agree as to the amount. With respect to the 498 hogsheads and 49 barrels of sugar put on board the *Hooyland* by Messrs. Lohse, Cortada & Co., before they received intelligence of the failure of M'Cormick, Ball & Co., the charterers, I am of opinion that the plaintiff is entitled to freight on the footing of the price stipulated for in the original charter-party, viz. 4l. 10s. per ton. The ground upon which I arrive at that conclusion is, that, upon the facts before us, from which we are to draw such inferences as a jury might draw, the 498 hogsheads and 49 barrels were not only shipped under the original charter-party, but were shipped by Messrs. Lohse, Cortada & Co. as agents of M'Cormick, Ball & Co., the original charterers, and therefore the case stands as if they had been shipped by the charterers themselves. That being so, the law does not admit of any doubt, that the charterers, having so shipped the goods, had no



\*372] right to require them to be unshipped. It was the captain's \*duty to retain them for the benefit of his owner, by way of lien for the sum which would become due in respect of freight to be earned under the charter-party. Then comes the question, what effect the bill of lading which the captain thought himself compelled to sign at a rate of freight lower than that mentioned in the charter-party, has upon the plaintiff's rights. It seems to me that it has no effect whatever. The captain had no authority from his owner, under the circumstances under which these goods were put on board, to substitute any new bargain for that which had already been entered into and which bound both parties. He had no right to vary the terms of that bargain. Therefore, so far as regards the 498 hogsheads and 49 barrels, the account must be taken between the parties on the basis of a charge of 4*l.* 10*s.* per ton, as mentioned in the charter-party.

With regard to the 108 hogsheads and 8 barrels subsequently put on board, I deduce from the facts stated in the special case this state of things, viz. that the charterers, Messrs. M'Cormick, Ball & Co., and their agents, Lohse, Cortada & Co., had declined to ship any more goods on the terms of the original charter-party; and therefore what occurred afterwards stands upon the same ground as if the captain had made a bargain with a third person on such terms as, acting for the benefit of his owner, he thought it prudent to make. These goods therefore were, I think, received upon the footing of quite a different contract, and one which the captain had authority to make so as to bind his owner. As to these, therefore, the bill of lading freight of 30*s.* per ton is that which ought to be attributed to them. This disposes of the whole case as originally argued, except as to the claim for expenses.

Besides the 100*l.* for disbursements stipulated by the charter-party \*373] to be deducted from the freight, there \*were some extras and necessary expenses incurred by the captain for the benefit of his owners. These, I think, ought to be allowed out of the freight.

In his reply, Mr. Watkin Williams entered upon a new field of contest, viz. that, as, by the terms of the charter-party, it was agreed, that, for security and payment of all freight, dead freight, demurrage, and other charges, the master and owners were to have an absolute lien and charge on the cargo, the plaintiff was entitled to a lien for what would have been the freight if a full cargo had been put on board,—treating that as dead freight which was wanting to constitute a full loading to the extent of the ship's capacity. The words relied on in support of this claim are the printed words inserted in all these documents; and, although they might have had an application if there had been any special provision in the charter-party as to dead freight to which they could be applied, yet, if there are no such special provisions, they are not to be regarded. There are many words in most mercantile instruments which have no meaning at all if the contract in hand does not fit them. It was contended by Mr. Williams that the damages which the plaintiff was entitled to recover for breach of the charter-party in not loading a full homeward cargo, would be dead freight within the meaning of the words used in this clause. But it seems to me that "dead freight" is wholly inapplicable to a

claim such as this, which consists merely of the right to have damages in respect of a failure to ship a full cargo.

Upon the whole, I think the plaintiff is only entitled to damages calculated according to the principles I have above stated.

WILLES, J.—I am of the same opinion. As to the 498 hogsheads and 49 barrels, it appears that they \*were loaded by the agents of the charterers with the intention of so far fulfilling the obligations of the charterers to load the vessel; and the bills of lading were signed by the master accordingly. The charter-party provided that those goods should be charged with the payment of freight at the rate of 4*l.* 10*s.* per ton, but the bills of lading were signed for a freight of 40*s.* per ton only; and, if those bills of lading had got into the hands of bona fide holders for value, as between them and the shipowner the freight of 40*s.* per ton only could have been enforced: but, as between the shipowner and the charterers, the bills of lading have no effect upon the charter-party. Had there not been a clause in the charter-party empowering the master to sign bills of lading at a lower rate of freight, and had the bills been in the hands of a bona fide holder for value, it might have been contended that the new contract was substituted for the old contract contained in the charter-party. In that case it might have been necessary to consider whether in signing the bills of lading there was fraud on the shipowner, as in *Faith v. The East India Company*, 1 B. & Ald. 680. But it is unnecessary now to consider that, because the charter-party gave power to the captain to sign bills of lading at any rate of freight. That power is probably reserved for the convenience of enabling the consignees to dispose of the cargo afloat, since, if the goods were burthened with a heavy charter freight, the bills of lading would not be negotiable. The charter-party, however, provides that the exercise of that right is to be without prejudice to the charter-party; and its exercise certainly would prejudice the owner's rights under the charter-party, if it were to affect the rate of freight as between him and the charterers. It seems to me to be quite obvious, that, unless that which took place between Lohse, \*Cortada & Co. and the master at Porto Rico had the effect of substituting the second charter-party for the first, the defendants must pay the 4*l.* 10*s.* stipulated for by the original charter-party. The master was not justified in sacrificing the rights of his owner by substituting for the contract for a freight of 4*l.* 10*s.* a ton a new contract for 30*s.* per ton. The bare statement of the proposition is sufficient to dispose of it. As to the alleged law of Spain with regard to the right of a shipper to take back goods once shipped being greater than in our own law, it is enough to say that there is nothing upon the face of the special case to show that such is the law of that country. Indeed, it should seem that the provision of the Spanish code by which a shipper can claim the unshipment and return of his goods at the port of loading, is inapplicable to a shipment by or on behalf of a charterer, and only applies to the case of shipment on board a general ship (*búque de carga general*). In the latter case, it is provided by article 765 of the *Codigo de Comercio*, that a shipper may require unshipment upon payment of half freight and all expenses of unstowing and restowing, but subject to an option on the part of the other shippers to purchase

his goods at the invoice price, instead of allowing him to unload them. So much as to the 498 hogsheads and 49 barrels which were put on board the ship by Messrs. Lohse, Cortada & Co. as agents for and on account of Messrs. M'Cormick, Ball & Co.

As to the 108 hogsheads and 8 barrels which were afterwards shipped, I apprehend it is perfectly clear that they were not shipped under the original charter-party, but under bills of lading making them deliverable in London on payment of freight at the rate of 30s. per ton, and that the owner is only entitled to demand that sum. The master finding himself in a foreign port with his ship only in part \*376] loaded, \*because the agents of the charterers, in consequence of the insolvency of the charterers, refused to ship any more goods, enters into a fresh contract to take on board other goods to complete his cargo. Was he not at liberty to do so? And, assuming that the merchant from whom he obtains such goods is aware of the existence of the charter-party, does that bind him to the terms of it? I apprehend not. I think the master had authority to do whatever was best for his owner: and I think in this matter he acted strictly within his authority, and consequently that the owner could only demand in respect of those goods the stipulated freight of 30s. per ton.

Then it is said, that, if that be so, the difference between the bill of lading freight and the 4l. 10s. stipulated for by the charter-party may be recovered as dead freight. In support of that Mr. Williams relies upon the clause in the charter-party by which it was agreed that "for the security and payment of all freight, *dead freight*, and demurrage and other charges, the master and owners should have an absolute lien and charge on the said cargo and goods laden on board;" and he has insisted that the damage sustained by the owner by reason of the charterers not having shipped a full cargo at the rate of freight stipulated for by the charter-party, was "*dead freight*" within that clause. I agree, however, with my Brother Williams, that the words in this part of the charter-party are mere ordinary words which have no precise signification. Besides, I apprehend the true meaning of dead freight is something totally different. As well might the words be applied to the 350l. which was to be paid by bills in advance on the sailing of the vessel from Glasgow, as to damages in respect of goods not put on board. I am aware that the expression "*dead freight*" \*377] has been applied to damages in respect of room lost in \*consequence of the charterers not loading according to the charter-party. But that has arisen from the poverty of our language: and I am not aware of any case in which a lien has been claimed in respect of such damages. The true meaning of dead freight is illustrated by the case of *Phillips v. Rodie*, 15 East 547. There, the freighters of a ship covenanted, that, if she should not be fully laden, he would not only pay for the goods on board, but also for so much in addition as the ship would have carried, for which he had before stipulated to pay freight according to different rates for three descriptions of goods: and it was held that the shipowner had no lien upon the goods actually on board for the amount of the *dead freight*, in other words, for the compensation in damages which he was entitled to for the freighter's breach of contract in not putting a full loading

on board,—which damages were unliquidated,—and there being no lien in such a case either by the usage of trade or the express contract of the parties. There was also a case of *Birley v. Gladstone*, 3 M. & Selw. 205, where the term “dead freight” was used to denote a sum to be paid in respect of space not filled according to the charter-party. There, the shipowners covenanted to receive a full cargo, and the freighter to load the same, and to pay so much for every ton of flax, &c., which should be delivered at the King’s beams at Liverpool, and so much per diem for demurrage, and the parties mutually bound themselves, especially the shipowners the ship, her tackle and appurtenants, and the freighter the goods to be laden and put on board, in a penal sum, for the performance of every article contained in the charter-party: and it was held that the shipowners had not a lien upon the goods actually brought home to Liverpool, for a sum of money claimed to be due in respect of goods which were put on board at the loading \*port, but afterwards relanded and restored to the agent of the freighter under process of the law at the [\*378 loading part, nor for a sum claimed for *dead freight*. I do not, therefore, say that the expression “dead freight” may not be so applied; but it is clear that it has not that meaning in the clause conferring a right of lien in this charter-party.

BYLES, J.—I am of the same opinion. This is a mere question of lien. We have nothing to do with any damages the plaintiff might have a right to claim in respect of the profit he has lost by not having a full homeward cargo shipped upon the terms stipulated by the charter-party. That remains untouched. Now, the captain clearly had no authority to vary the terms upon which that part of the cargo which was first shipped was to be carried: as to that, therefore, the plaintiff was entitled to demand and had a lien for the 4*l.* 10*s.* per ton. Then, with respect to the goods subsequently shipped. What was the captain to do when Messrs. Lohse, Cortada & Co. refused to ship any more goods on account of M’Cormick, Ball & Co.? Was he to return with a half-loaded ship? I conceive he was justified in entering into a new contract in order to complete the loading. Acting for the best, in the interest of his owner, he accordingly makes a new contract to carry 108 hogsheads and 8 barrels of sugar for Lohse, Cortada & Co., at a freight of 30*s.* per ton. To that freight the plaintiff is entitled. That sum would have to be deducted from any damages which the plaintiff would be entitled to claim for not having had a full and complete cargo. The sum which has been called dead freight would be the difference between the freight stipulated for by the first charter-party, and the 30*s.* stipulated for by the new contract. I should rather call it substituted freight. The plaintiff’s lien will therefore be limited in the way suggested.

\*KEATING, J.—I entirely agree with the rest of the court, and [\*379 do not think it necessary to add anything.

WILLIAMS, J.—I forbore to make any remarks upon the cases of *Shand v. Sanderson*, 4 Hurlst. & N. 381, *Kirchner v. Venus*, 12 Moore’s P. C. 361, and *Kern v. Deslandes*, 10 C. B. N. S. 205 (E. C. L. R. vol. 70), because I considered that the clause in the charter-party by which the master was to be allowed to sign bills of lading

at any rate of freight, had no effect, seeing that in our view the goods had been shipped by the charterers themselves.

Judgment for the plaintiff for 908*l.* 8*s.* 4*d.* over and above the 225*l.* paid into court.

It is pretty well established that the primary circumstance to be considered in determining whether an owner must be held to have abandoned his lien for freight, where the ship is under a charter-party, is whether or not the bills of lading on which the cargo has been shipped, are in the hands of bonâ fide holders for value, who are ignorant of the terms of the charter-party; a due consideration of which will serve to reconcile some cases otherwise entirely inconsistent.

In the foregoing case the lien of the owner was maintained on the express ground that the shippers were the agents of the original charterers, and the consignment being on their account, they were to be deemed, as they unquestionably were, cognisant of the terms of the charter-party, and the subsequent fact of the master having signed bills for less freight, was of no importance; but Willes, J., in his opinion says, "If the bills of lading had got into the hands of bonâ fide holders for value, the owner could only have enforced his lien to the amount therein specified," which is in accordance with the doctrine laid down in *Foster v. Colby*, 3 Hurlst. & Norm. 705.

Unless the fact of the bills of lading being in the hands of an assignee for value is to be deemed a determining characteristic in cases otherwise similar, it is impossible to reconcile the following, so nearly alike are they in every respect, save that in the latter there is no mention made of the bills having passed from the hands of the shippers: the question of lien in *Tamvico v. Simpson*, first decided in 115 Eng. Com. Law Rep. 453 and subsequently affirmed in the Exchequer

Chamber, Law Rep. 1 C. P. 363, arose on a charter-party stipulating that the freight was to be paid on unloading and right delivery of the cargo, one-half the freight to be advanced by the shipper's acceptance at three months on signing bill of lading. The acceptance was given and a receipt endorsed on the bill of lading which was assigned to a holder for value; prior to the arrival of the vessel and before the acceptance matured the charterer became insolvent; on the ship subsequently reaching her destination the master claiming a lien refused to deliver the cargo until the entire freight was paid, though the acceptance had not yet matured.

The freight being paid under protest, on a suit brought to recover it, the Court, Pollock, C. B., delivering the opinion, held, that the giving of the acceptance by the charterer was not a mere loan to the owner, but was a prepayment of a moiety of the freight, and the receipt of the master on the bill of lading having treated it as such, a bonâ fide holder of the bill was entitled to the delivery of the cargo on payment of the balance, the owner's lien to any further extent being gone.

In the case of *The Kimball*, decided in this country and reported in 8 Wallace U. S. 37, the charter-party provided that part of the charter-money was to be paid during the voyage, the balance one-half in five and one-half in ten days after discharge of homeward cargo; \$10,000 of the charter-money was accordingly paid in promissory notes falling due about the time the vessel was expected to arrive; before she reached port, however, and before the notes were due, the charterers became insolvent; the owners

claiming a lien for the entire freight, refused to deliver the cargo on the vessel's arrival until paid. On the hearing of a libel, filed to enforce the lien, the Court held, that the notes being given as an advance of a portion of the freight, could be recovered back, or their amount, if paid, if the vessel failed to arrive, and therefore in the absence of evidence to the contrary, the owner was not to be presumed to have intended to waive his lien on the cargo for freight, and the charterers having become insolvent the owner might return the notes and enforce his lien.

Unless the circumstance that the prepaid freight could be recovered back in case the ship failed to arrive, which was denied as the law in England in *De Cuadra v. Swann*, 111 Eng. Com. Law Rep. 772, had a determining influence in the *Kimball* case, we are driven to the conclusion that the true distinction is to be found in the fact that the bills there were never assigned to a *bonâ fide* holder, while in *Tamvico v. Simpson*, which was decided first, the Chief Baron says the holder of the bills being *bonâ fide* is entitled to delivery—a point not alluded to by *Field, J.*, who delivered the opinion in the case of the *Kimball*, the decision being placed on the ground that the

notes were no payment, and the holder should not be considered as having abandoned his superior right of lien, until actual payment; which certainly seems more in accordance with the law both in this country and in England as regards the effect of notes and bills upon previous claims.

Where the charter-party stipulates that the owner is to have a lien on the cargo for freight, at a certain rate per ton, he is not entitled to a lien for the difference between the amount of freight actually paid as per bills, and the whole amount stipulated for in the charter-party, as against part of the cargo shipped by the charterers themselves under bill calling for freight as per charter-party; at any rate, not where such bill is in the hands of a *bonâ fide* endorsee for value: *Fry v. The Bank of India*, Law Rep. 1 C. P. 688. *Erle, C. J.*, in this case says, "The true construction of the words in the bill of lading, is that they refer to the rate in the charter-party, and the owner has no lien on each part of the cargo for the whole freight." It is otherwise, however, where the charter-party calls for the payment of a round sum as freight: *Chappel v. Comfort*, 100 Eng. Com. Law Rep. 802, and *Kern v. Deslandes*, Id. 205.

### BERRESFORD and Others *v.* MONTGOMERIE and Others. May 27.

The 67th section of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), enacts, that, where the owner of goods imported fails to make entry thereof, or, having made entry, to land the same or take delivery thereof within a certain time, the shipowner may make entry of and land or unship the goods at the times and in the manner and subject to certain conditions,—amongst others, "*if at any time before the goods are landed or unshipped, the owner has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods, or of such wharf or warehouse as last aforesaid, twenty-four hours' notice in writing of his readiness to deliver the goods,*" &c.:—

Held, that, to entitle himself to notice under this condition, the owner of the goods must at the time of his offer be in a condition actually to take delivery thereof.

And held, that, where the shipowner at the time of the offer to take delivery is not able to make it, he is not excused from the duty of giving twenty-four hours' notice of his readiness to deliver, because the owner of the goods or his agent does not ask for "correct information of the time at which such goods can be delivered."

THIS was an action by the plaintiffs, merchants, against the defendants, shipowners, for a breach of the Merchant Shipping Act Amendment Act, 1862, 25 & 26 Vict. c. 63.

\*380] The first count of the declaration stated, that, before \*and at the time of the grievances thereafter mentioned, the plaintiffs were owners of goods, to wit, of hides, within the meaning of the Merchant Shipping Act Amendment Act, 1862, and were entitled as agents for the owners thereof to the possession of the same; that the defendants were shipowners within the said act, and were authorized to act as agents for the owners of a certain ship called *The City of Edinburgh*, and were entitled to receive the freight, demurrage, and other charges in respect of the said ship: that the said goods were imported in the said ship from foreign parts into the united kingdom in the said ship, and that, before the said goods were landed or unshipped, they the plaintiffs made entry of the said goods within the meaning of the said act for the landing and warehousing thereof at their wharf called *Pickle Herring Upper Wharf*, which said wharf was not the wharf at which the said ship was discharging, and were entitled and ready, and offered, to take delivery of the said goods,—of all which premises the defendants had notice: that all things were done and had happened and existed, and all times had elapsed, to entitle them the plaintiffs to take such delivery and to land the said goods, yet the defendants did not allow them to do so: that the defendants and all persons whose duty it was so to do failed to make such delivery, and failed at the time of such offer to give the plaintiff correct information of the time at which the said goods could be delivered: that, without the consent of the plaintiffs, the defendants landed and unshipped the said goods at a wharf or place (to wit) at the London Docks, other than the plaintiffs' wharf, which had been named in the entry aforesaid, and without giving to them, being the owners of the said goods and wharf as aforesaid, twenty-four hours' notice of their readiness to deliver the said goods, and did not bear \*381] or pay the expenses of \*landing and unshipping the same: and that, by reason of the premises, the plaintiffs were compelled and obliged, in order to obtain possession of the said goods, to pay divers large sums of money as the expenses which had been incurred by reason of such landing and unshipping as aforesaid, and also lost the use of and had to pay large sums for the demurrage of divers barges and lighters which they had employed to take delivery of the said goods, delivery of which the defendants failed to make, and did not allow the plaintiffs to take, as in that count mentioned.

There was also a count for the conversion of bales of hides, and a count upon an account stated.

The defendants pleaded,—first, not guilty,—secondly, a traverse of the allegation that the plaintiffs had made entry of the goods within the meaning of the act,—thirdly, a traverse that they were ready and

willing and had offered to take delivery of the goods,—fourthly, a traverse of the allegation that the plaintiffs did not have twenty-four hours' notice, as alleged,—fifthly, to the second count, that the goods were not the plaintiffs' goods. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after last Hilary Term. The facts were as follows:—The City of Edinburgh arrived in the London Docks on the 24th of March, 1863, having on board fifty bales of hides consigned to Laroche & Co., and was duly reported. On the 26th Laroche & Co. entered the hides inwards at the Custom House, and obtained an order for their delivery over the ship's side for landing at the plaintiffs' wharf, Pickle Herring Upper Wharf. They immediately sent this order to the plaintiffs, together with the bills of lading duly endorsed. The plaintiffs handed the delivery order to Chapman, their lighterman, who sent one Cayley, his apprentice, to the vessel to inquire if the goods were \*ready for delivery. Cayley arrived on board at about 4 o'clock in the afternoon of that day, when he saw the second mate, to whom he handed the order. The hatches were closed, and no unloading was then going on. The mate told the lad that the hides were not ready for delivery. There was no lighter alongside the ship at this time; but there was one lying in the dock about one hundred yards off, which might have been brought alongside if the goods had been ready. Cayley thereupon left the order with the mate and went away. At 9 o'clock on the morning of the 27th, the Dock Company made an entry for landing the hides. On the 28th, they were reached, and, after a portion of them had been landed on the quay, the second mate recollected that he had received the order from the plaintiffs, and showed it to the first mate. The Custom House officer who was superintending the landing thereupon said that notice should have been sent to the plaintiffs; but the first mate directed the unloading to proceed, and the hides were warehoused by the Dock Company, who refused to give them up to the plaintiffs without payment of 10*l.* 2*s.* 6*d.* for landing and warehousing. The money was paid under protest, and this action brought.

The ordinary working hours at the docks, it appeared, were from 8 A. M. to 4 P. M.; the Custom House hours from 6 A. M. to 6 P. M.: but it was proved that the working hours in the docks occasionally were the same as the Custom House hours.

On the part of the plaintiffs it was submitted, that, under the 67th section of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), they were under the circumstances entitled to twenty-four hours' notice that the goods were ready for delivery, and that the landing of the goods in the docks without giving them such notice was a conversion.

\*For the defendants it was contended that the mere delivery of an order to the mate after working hours, and when there were neither lighters nor men at hand to receive the goods, was not such a demand as to entitle the plaintiffs to notice under the statute, and that the plaintiffs' application for the hides ought to have been renewed on the following morning.

Under the direction of the learned judge, a verdict was entered for the plaintiffs for the sum claimed, 10*l.* 2*s.* 6*d.*, leave being reserved to



the defendants to move to enter a verdict for them, if the court (drawing such inferences from the facts as a jury might draw) should be of opinion that the defendants were not in default,—the judgment of the court to be conclusive, unless the court should otherwise order.

*Giffard*, in Easter Term last, obtained a rule nisi accordingly.

*F. M. White* (with whom was *Lush*, Q. C.) now showed cause.—The question in this case turns upon the construction to be put upon the 67th section of the 25 & 26 Vict. c. 63, which enacts, that, “where the owner of any goods imported in any ship from foreign parts into the united kingdom fails to make entry thereof, or, having made entry thereof, to land the same or take delivery thereof and proceed therewith with all convenient speed by the times severally hereinafter mentioned, the shipowner may make entry thereof, and land or unship the said goods at the times, in the manner, and subject to the conditions following, that is to say,—1. If a time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the time so expressed,—2. If no time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the \*<sup>384</sup> expiration of 72 hours, exclusive of a Sunday or holiday, after the report of the ship,—3. If any wharf or warehouse is named in the charter-party, bill of lading, or agreement, as the wharf or warehouse where the goods are to be placed, and if they can be conveniently there received, the shipowner, in landing them by virtue of this enactment, shall cause them to be placed on such wharf or in such warehouse,—4. In other cases, the shipowner, in landing goods by virtue of this enactment, shall place them in and on some wharf or warehouse on or in which goods of a like nature are usually placed; such wharf or warehouse being, if the goods are dutiable, a wharf or warehouse duly approved by the commissioners of customs for the landing of dutiable goods,—5. If at any time before the goods are landed or unshipped, the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed so to do, and his entry shall in such case be preferred to any entry which may have been made by the shipowner,—6. If any goods are, for the purpose of convenience in assorting the same, landed at the wharf where the ship is discharged, and the owner of the goods at the time of such landing has made entry and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, such goods shall be assorted at landing, and shall, if demanded, be delivered to the owner thereof within twenty-four hours after assortment; and the expense of and consequent on such landing and assortment shall be borne by the shipowner,”—7. (which is the material one to be considered here) “If at any time before the goods are landed or unshipped, the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and \*<sup>385</sup> the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered,

then the shipowner shall before landing or unshipping such goods under the power hereby given to him, give the owner of the goods, or of such wharf or warehouse as last aforesaid, *twenty-four hours' notice in writing of his readiness to deliver the goods*, and shall, if he lands or unships the same without such notice, do so at his own risk and expense." Entry having been made by the owners of these goods for landing and warehousing them at a particular wharf, and delivery having been once demanded, it was the duty of the shipowners to give them notice of their readiness to deliver them; and they had no right to put them on a place where the owners did not want them, and to saddle them with expenses to procure their release. A shipowner has no right, independently of the statute, at once on the ship's arrival in a dock or at a wharf to land the goods: *Syeds v. Hay*, 4 T. R. 260; *Gatliffe v. Bourne*, 5 Scott 667, 4 N. C. 314 (E. C. L. R. vol. 33); *Bourne v. Gatcliffe*, in the Exchequer Chamber, 3 Scott N. R. 1, 3 M. & G. 643 (E. C. L. R. vol. 42); in the House of Lords, 11 Clark & Fin. 45, 8 Scott N. R. 404; though the shipowner was not bound to wait an indefinite time: *Howard v. Shepherd*, 9 C. B. 297 (E. C. L. R. vol. 67). The clause now under consideration was introduced into the Merchant Shipping Act Amendment Act of 1862 for the express protection of wharfingers. The plaintiffs, having put themselves in a position to receive the goods, and having once intimated their readiness to take delivery, it clearly was the duty of the defendants to give them notice. [WILLES, J.—The intimation of readiness to receive the goods was given after working hours on the 26th of March.] The second mate took the order without objection on that score. \*Besides, these not being dutiable goods, they might have been landed up to 6 P. M. If Cayley had been told [\*386 the request could not be complied with because it was brought too late, he would have gone again on the following morning. All that was said, however, was, that the hides were not ready for delivery.

*Giffard and Murphy*, in support of the rule.—The question is whether that which was done by the Dock Company was done rightly under the Merchant Shipping Act Amendment Act and their own Acts; or, in other words, whether what was done by the plaintiffs was a compliance with the 7th article of the 67th section of the first-mentioned act. It is submitted that what the plaintiffs did was a mere colourable compliance with that provision. These were packages weighing 5 cwt. each. A mere inquiry whether they were ready for delivery, unless the party making it was ready at the time to take delivery, amounts to nothing. It did not appear that Cayley had a lighter alongside. [ERLE, C. J.—What was the use of having a lighter there on the 26th, when the shipowners were not ready to deliver the hides?] The words of the statute are "has offered and been ready to take delivery." Can it be said that these words are complied with by mere proof of sending down an order at a time when it was impossible for the one party to deliver and for the other to receive the goods? This is not like the case of *Startup v. MacDonald*, 2 Scott N. R. 485, in error, 7 Scott N. R. 269, 6 M. & G. 593 (E. C. L. R. vol. 46): there, the tender was made, though not within the ordinary business hours, yet while there remained sufficient of the natural day for completing the delivery of the oil, and there was some

one at the warehouse who might have received it. [WILLES, J.—The plaintiffs' servant, on handing the order to the second mate, \*387] asked him if the goods were \*ready; and the answer he received, was, that they were not. What was the man to do?] He should have come again on the following morning. The mate was not bound, unless asked, to tell him when the goods would be ready. [BYLES, J.—I should think he was.] That might have been so, perhaps, if the man had gone there prepared to take delivery. [BYLES, J.—It was never suggested that his going there was a mere pretence. If it had been, I should not have withdrawn the matter from the jury. WILLES, J.—If we are to assume that Cayley really went for the purpose of getting the goods, and that the lighter was ready though not actually alongside, and that the goods could not be got, there is an end of the case.] Some effect must be given to the words "has offered and been ready to take delivery: they clearly are not satisfied by a mere inquiry for information. The offer must be made at a time when there is a present ability to receive the goods. The construction contended for on the other side gives no effect to the expression "failed to give information." The shipowners cannot be said to have been in default in this respect, unless they have been asked for information, and have refused to give it.

ERLE, C. J.—On considering the evidence given in this case, and which we are to deal with as a jury would, the balance in my mind is in favour of the plaintiffs. The shipowners would have had a right to land the goods as they did, unless the owners of the goods brought themselves within the 7th article of the 67th section of the 25 & 26 Vict. c. 63, which provides, that, "if at any time before the goods are landed or unshipped the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, *and has offered* \*388] *and been ready to take \*delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered*, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods or of such wharf or warehouse as last aforesaid twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice, do so at his own risk and expense." The facts are these:—Certain bales of hides consigned to Messrs. Larocche & Co. arrived in the London Docks on board The City of Edinburgh on the 25th of March. The consignees entered them inwards at the Custom House, and obtained a delivery order for landing them at Pickle Herring Wharf, a wharf belonging to the plaintiffs, and they delivered the order to the plaintiffs, who sent it by an apprentice, a youth about 18, on board the vessel. The lad went on board, and handed the order to the second mate, who told him the goods were not then ready for delivery. The plaintiffs had no lighter alongside the City of Edinburgh at this time; but there was one 100 yards off. Do these facts show that the merchants offered and were ready to take delivery of the hides? Did they really wish to get their goods? I think it is manifest that they intended to get the hides conveyed to Pickle

Herring Wharf. They sent the delivery order to the vessel through the ordinary channel. I cannot see the least pretence for calling that colourable. If what was done at 4 o'clock in the afternoon had been done at mid-day, and by two lightermen of full age instead of by a lad of 18, and the lighter had been alongside instead of 100 yards off, no question could have been raised. If the order had been presented within the ordinary working hours, I do not \*see why a lighterman of 18 should not have been as competent to receive the [\*389 goods as one a few years older; nor do I see that the fact of the lighter being a few yards more or less distant from the ship's side makes any difference. Much stress was laid on the time at which Cayley was sent to the ship, viz., the ordinary hour for striking work in the docks, 4 P. M. But, if the hides had been readily accessible, and the labourers had left off work, the mate would probably have desired Cayley to come in the morning. Instead of that, however, the answer was, "The goods are not ready for delivery." There is nothing in the evidence to induce me to come to the conclusion that there was not an offer and a readiness to take delivery on the part of the merchants. That being so, and the shipowners having failed to make delivery, or to give correct information of the time at which the goods could be delivered, they were bound to give twenty-four hours' notice of their readiness to deliver them. Under these circumstances the shipowners were clearly not justified in landing the goods as they did. I think the plaintiffs had properly complied with the conditions required of them by article 7.

WILLIAMS, J.—I must confess I have felt some difficulty, not as to the law applicable to the case, but as to the conclusion we ought to come to upon the facts. The legislature seem to have thought proper to control the general power given to the shipowner by the 67th section of the 25 & 26 Vict. c. 63, by certain conditions, the 7th of which provides that if the owner of the goods has made entry for landing and warehousing the goods at any wharf other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery and to give the owner of the \*goods information of the time at which they can be delivered, he shall before landing them give the [\*390 owner twenty-four hours' notice of his readiness to deliver them. The question is whether the events have happened here upon the happening of which the owner of these hides was entitled to the twenty-four hours' notice. To raise this predicament, there must not only have been a failure on the part of the shipowners to deliver, but the merchants must have offered and been in a condition to take delivery of the goods. I feel some difficulty in coming to the conclusion that the owners were ready to take delivery. My Lord and my two learned Brothers think there was evidence that they were. I do not quite agree with them: but, as it is a mere question of fact, that is not very material. As to the remaining question of fact, whether there was a failure on the part of the shipowners to give the owners of the goods correct information of the time at which the goods could be delivered,—it was contended on the part of the defendants, that it was necessary not only that the shipowners should have neglected to give such information, but that they should have refused to give it

after being asked for it. I cannot assent to that construction. The 67th section was inserted in ease of the shipowner. The 7th condition, however, requires him to give the information, and, on his failure to give it, obliges him to give twenty-four hours' notice of his readiness to deliver. Upon the whole, I am disposed to agree with the rest of the court, that the plaintiffs are entitled to recover.

BYLES, J.—I am of the same opinion. I quite agree in all the observations of my Lord as to the question of law,—upon which, indeed, the court is unanimous. As to the facts, Mr. Giffard had the offer to \*391] go to the \*jury, but he declined to do so. And in this I think he acted with judgment; for here he has succeeded in raising a doubt, which he probably would have failed to do at nisi prius.

My Brother Willes, who was obliged to go to Chambers, desired me to say that he concurs in this judgment, for the following reasons,—that it is now ascertained, or not disputed, that Cayley was an agent to offer to receive the hides; that he did offer, and to a person who had authority to receive the offer; that Cayley was ready, *i. e.*, as ready as a reasonable man would or need be, to take the goods; that the shipowners were not ready to deliver, and failed to give the owners of the goods correct, for they failed to give them any, information of the time at which the goods could be delivered; and that they also failed to give the owners of the goods twenty-four hours' notice of their readiness to deliver.

Rule discharged.

### THE DEAN AND CHAPTER OF THE CATHEDRAL CHURCH OF CHRIST IN OXFORD v. THE DUKE OF BUCKINGHAM AND CHANDOS. *June 7.*

The Dean and Chapter of Christchurch, Oxford, the owners of the manor of Malsmorton, in Bucks, had from the year 1710 been in the habit of granting leases of the manor, and of renewing them from time to time. By one of these leases, which was made to Richard Grenville, then Duke of Buckingham, in 1828, the manor, with all lands, tenements, rents, reversions, and services thereunto belonging or appertaining, together with the keeping and profits of the courts and leets, with all wards, marriages, reliefs, &c. (except and reserved to the Dean and Chapter all the rents of the freeholders of the manor and all timber-trees),—were demised to the Duke, his executors and administrators, from the 10th of October, 1826, for twenty-one years, subject to the payment of the money and corn-rents therein mentioned; with a proviso against alienation of the demised premises without the previously obtained consent of the Dean and Chapter.

By indenture of the 1st of August, 1833, the said Richard Grenville, Duke of Buckingham, assigned to trustees, upon certain trusts, all the manors, messuages, lands, tenements, tithes, and other hereditaments of or to which he was absolutely possessed or entitled at law or in equity for any term or terms of years beneficially, and not as mortgagee or trustee.

On the 18th of December, 1833,—the first seven years of the before-mentioned lease of the manor having then expired,—a new lease of the manor in the same terms was granted by the Dean and Chapter to the Duke (Richard Grenville) for twenty-one years from Michaelmas, 1833.

In January, 1839, the Duke (Richard Grenville) died, having by his will devised all his real and personal estate to his son, appointing him his sole executor.

On the 26th of January, 1842, the Dean and Chapter granted a fresh lease of the manor to Richard Plantagenet, the then Duke, for twenty-one years from Lady Day, 1841, in the same terms as the former leases.

In neither of the leases of 1833 and 1842 was any mention made of the deed of the 1st of August, 1833; nor was any license to alienate applied for; nor was the deed ever notified to the Dean and Chapter until March, 1863.

At a special court baron of the late Duke (Richard Grenville) described as "farmer of

the Dean and Chapter of Christchurch, and lord of the said manor," on the 29th of April, 1836, one Hearn was admitted to a copyhold tenement of the manor for three lives, on payment of 275*l*.

At a court held on the 2d of April, 1840, it was presented that Hearn had, out of court, in consideration of 800*l*., surrendered the copyhold to which he had been admitted in 1836, to the use of the then Duke (Richard Plantagenet), his heirs and assigns, and the Duke was thereupon admitted tenant, to hold the same tenement to the use of himself, his heirs and assigns, during the three lives and the life of the survivor: and, at a court held on the 9th of May, 1845, one of the lives having dropped, the then Duke, as lord of the manor, granted the same tenement to himself, his heirs and assigns, for the life of his son, the now Duke.

At a court held on the 3d of July, 1840, the persons for whose lives a certain copyhold tenement had been granted in 1800 and 1811 being all dead, the Duke granted the same tenement to himself for the life of himself and the lives of his son (the now Duke) and of his sister (Lady Anna Eliza Grenville), and the life of the survivor of them.

At a court held on the 11th of November, 1811, the then lord granted a copyhold tenement to Richard Grenville (then Earl Temple), Richard Plantagenet (then Viscount Cobham), and Lady Mary Arundell, for their lives and the life of the survivor.

At a special court held by the then Duke, Richard Plantagenet, on the 8th of July, 1840, the death of the late Duke was presented, and thereupon the same tenement was granted to Richard Plantagenet, his heirs and assigns, during the life of the defendant, then Marquis of Chandos. There was a similar grant at a court held on the 9th of May, 1845, on the death of Lady Mary Arundell.

Richard Plantagenet, Duke of Buckingham, died on the 29th of July, 1861, and all such interest as he had in the property in question vested in his only son, the defendant:—

Held, that the above grants were ineffectual and void in law, as having been made by the lord to himself; and that there was nothing in the facts stated in the case to warrant the court in presuming, as to the grants made subsequently to the date of the indenture of August 1, 1833, that they were made by the Duke as agent for the trustees named in that deed.

THE following case is, by order of Byles J., dated the 23d of February, 1864, stated for the opinion of this court, without pleadings:—

\*The manor of Maidsmorton, in the county of Bucks, is the [\*392 property of the Dean and Chapter of Christchurch, Oxford; and they or their lessees have the right of making grants for three lives of certain copyhold tenements. The copyholders themselves having no right of renewal.

In or about the year 1710, the manor was demised by the plaintiffs for twenty-one years; and the lease was from time to time subsequently renewed by them for further periods of seven years.

\*In the year 1828, one of these renewed leases was made to [\*393 Richard Grenville Nugent Chandos Temple, Duke of Buckingham and Chandos. By the terms of that lease, all that manor or lordship of Maidsmorton, in the county of Bucks, with all lands, tenements, rents, reversions, and services thereunto belonging, or in anywise appertaining, together with the keeping and profits of the courts and leets, with all wards, marriages, reliefs, escheats, and all other commodities and emoluments whatsoever to the manor or lordship belonging or appertaining, except and reserved to the Dean and Chapter during the demise all the rents of the freeholders of the manor, and all timber-trees then standing or which during the demise should stand upon the premises,—were demised to the said Richard Grenville, Duke of Buckingham and Chandos, his executors and administrators, from the 10th of October, 1826, for twenty-one years, subject to the payment of the money and corn-rents therein mentioned; and the same lease contains a proviso against any alienation of the demised premises without the previously obtained license of the Dean and Chapter.

By indenture dated the 1st of August, 1833, all the manors, mes-

suages, lands, tenements, tithes, and other hereditaments of or to which the said Richard Grenville Nugent Chandos Temple, Duke of Buckingham and Chandos, was absolutely possessed or entitled at law or in equity for any term or terms of years beneficially, and not as mortgagee or trustee, were assigned to Sir Thomas Francis Freemantle and James Buller East, therein described, upon the trusts therein mentioned.

On the 18th of December, 1833 (the first seven years of the before-mentioned lease of the manor having then expired), a lease of the manor for twenty-one years as from Michaelmas, 1833, was granted \*394] by the \*plaintiffs to the same lessee. This lease is (substantially) in the same form and terms as the last-mentioned lease.

In January, 1839, Richard Grenville Nugent Chandos Temple, Duke of Buckingham and Chandos, died, having made a will giving all his real and personal estate to his son Richard Plantagenet Temple Nugent Brydges Chandos Grenville, commonly called Marquis of Chandos, and appointing him his sole executor; and, on the 26th of January, 1842, a lease of the manor for twenty-one years as from Lady-day, 1841 (at which time seven and a half years of the former renewed lease would have expired), was granted by the plaintiffs to the said Richard Plantagenet Temple Nugent Brydges Chandos Grenville, then Duke of Buckingham and Chandos. This last lease is also (substantially) in the same form and terms as the lease of 1828.

In neither of the leases of 1833 and 1842 is any mention made of the deed of the 1st of August, 1833. No license was applied for for the alienation of the property comprised in that deed; nor was the deed ever notified to the plaintiffs until the month of March, 1863.

The court-rolls of the manor show (as the fact was), that, at a special court-baron held on the 29th of April, 1836, of the Duke of Buckingham and Chandos (farmer of the plaintiffs), lord of the said manor, it was presented by the homage that Thomas Hearn had lately purchased the life-interest of one Gilbert Flesher, the only then surviving life, in a copyhold tenement, and, having paid a sum of 275*l.* to the lord of the manor for the insertion of two new lives, the lord, by his steward, John King, granted the said tenement to the said Thomas Hearn, his heirs and assigns, for the lives of the said Gilbert \*395] Flesher and of \*Richard Carter and Edward Parrott, and the lives and life of the survivors and survivor of them, at the will of the lord, according to the custom of the said manor: and the said Thomas Hearn was thereupon admitted tenant for the lives and life aforesaid.

The court-rolls of the manor further show (as the fact was), that, at a special court of the then Duke of Buckingham and Chandos, described as above mentioned, held on the 2d of April, 1840, it was presented by the homage, that, on the 1st of the same month, the said Thomas Hearn had, out of court, in consideration of 800*l.* paid to him by the said Richard Plantagenet, Duke of Buckingham and Chandos, surrendered into the hands of the lord of the manor, by the acceptance of his steward, John King, the copyhold tenement to which the said Thomas Hearn had been admitted on the 29th of April, 1836, to the use of the said Richard Plantagenet, Duke of Buckingham and Chandos, his heirs and assigns, for the lives of the said Gilbert Flesher,

Richard Carter, and Edward Parrott, and the lives and life of the survivors and survivor of them, at the will of the lord, according to the custom of the said manor: and the said Richard Plantagenet, Duke of Buckingham and Chandos, was thereupon, by his attorney, Henry Smith, admitted tenant, to hold the said tenement unto and to the use of him the said Richard Plantagenet, Duke of Buckingham and Chandos, his heirs and assigns, during the lives of the said Gilbert Flesher, Richard Carter, and Edward Parrott, and the lives and life of the survivors and survivor of them.

The court-rolls of the manor further show (as the fact was), that, at the court of the said Richard Plantagenet, Duke of Buckingham and Chandos, described as aforesaid, held on the 9th of May, 1845, the said Gilbert Flesher being then dead, the lord of the manor, [\*396] by his steward, Henry Smith, granted the said tenement unto the said Richard Plantagenet, Duke of Buckingham and Chandos, his heirs and assigns, for the life of the defendant, Richard Plantagenet Campbell, then Marquis of Chandos, now the Duke of Buckingham and Chandos.

The court-rolls of the manor further show (as the fact was), that, at the special court of the said Richard Plantagenet, Duke of Buckingham and Chandos, described as aforesaid, held on the 3d of July, 1840, it was presented by the homage that all the persons for whose lives and the lives and life of the survivors and survivor, a copyhold tenement had been granted in the years 1800 and 1811 were dead; and thereupon the lord of the manor, by his steward, John King, granted the same tenement to the said Richard Plantagenet, Duke of Buckingham and Chandos, his heirs and assigns, for the lives of himself and of his son the defendant (then Marquis of Chandos), and of his (the defendant's) sister, Lady Anna Eliza Mary Gore Langton, now the wife of William Henry Powell Gore Langton, Esq., and therein described as Lady Anna Eliza Grenville, and the lives and life of the survivors and survivor of them; and the same Duke was, by his attorney, Henry Smith, thereupon admitted tenant, to hold the same tenement to him and his heirs and assigns, for the lives of himself and the defendant and the said Lady Anna Eliza Mary Gore Langton, and the lives and life of the survivors and survivor of them.

The court-rolls of the manor further show (as the fact was), that, at the court of the then lord of the said manor, held on the 11th of November, 1811, the then lord, by his steward, granted a copyhold tenement unto the said Richard Grenville, Duke of Buckingham and Chandos (then Earl Temple), the said Richard Plantagenet, Duke of Buckingham and Chandos (then \*Viscount Cobham), and Lady [\*397] Mary Arundell, for the term of their lives, and the life of the survivors and survivor of them, successively, according to the custom of the manor.

The court-rolls of the manor further show (as the fact was), that, at a special court of the said Richard Plantagenet, then Duke of Buckingham and Chandos, described as aforesaid, held on the 3d of July, 1840, it was presented by the homage that the said Richard Grenville, Duke of Buckingham and Chandos, had lately died, and thereupon the lord of the manor, by his steward, John King, granted the same tenement unto the said Richard Plantagenet, Duke of Buckingham



and Chandos, his heirs and assigns, during the life of the defendant (then Marquis of Chandos); and the said Richard Plantagenet, Duke of Buckingham and Chandos, was, by his said attorney, Henry Smith, admitted tenant of the said tenement, to hold to him and his heirs and assigns during the life of the said defendant, then Marquis of Chandos.

The court-rolls of the manor further show (as the fact was), that, at the court of the said Richard Plantagenet, Duke of Buckingham and Chandos, described as aforesaid, held on the 9th of May, 1845 (the said Lady Mary Arundell being then dead), the lord of the manor, by his steward, Henry Smith, granted the said tenement unto the said Richard Plantagenet, Duke of Buckingham and Chandos, to hold the same unto the same duke, his heirs and assigns, for the life of the said Lady Anna Eliza Mary Gore Langton, according to the custom of the manor whensoever the same premises should come into the hands of the lords of the said manor.

Richard Plantagenet, Duke of Buckingham and Chandos, died on the 29th of July, 1861; and all such interest as he may be held to \*398] have had in the \*property in question has vested in his only son, the defendant.

The plaintiffs contend that each and every of the above-mentioned grants made respectively at the said courts holden on the 2d of April, 1840, the 3d July, 1840, and the 9th May, 1845, are ineffectual and void in law; and that the several parties claiming to hold the said copyhold tenements under and by reason of such grants are not entitled to hold the same.

The defendant contends that each and every of such grants is effectual and valid in law; and that the premises therein comprised are become vested in him for the lives subsisting therein under such grants; and that he is entitled to hold the same accordingly.

The question now submitted to the opinion of this court, is, whether all or any and which of such grants are effectual and valid or not.

*Hayes*, Serjt. (with whom was *Cripps*), for the plaintiffs.—The grants in question are void. It is necessary to the validity of a grant that there should be a grantor capable of granting, and a grantee capable of taking. At the time of making these grants, the grantor was lord farmer of the manor. *Nemo potest esse tenens et dominus*. There is no case exactly in point: but authorities are not wanting to establish the principle which must govern this case. In *Firebrass v. Symes*, 2 Wils. 254, the question was, whether the demise by copy of court-roll by a lord of a manor to *his wife* was good in law: but the court said,—“As this was a provision by a husband for his wife, we should be glad (if possible) to get over that maxim in law ‘*that a husband and wife are one person*,’ and therefore cannot grant lands to one another: so, where there is no particular custom in a manor, the \*399] \*common law must take place: this is an original voluntary grant by the husband to the wife, who cannot by law take immediately from him, any more than a monk, who is dead in law, and considered as no person: so here is no person to take, for, the wife and husband are only one person. We are dealing with a fundamental maxim of the common law, and might as well repeal the first section of Littleton as determine this grant from the husband immediately to the wife to be good, and where there is not so much

as the shadow of a person intervening." [WILLES, J.—Does this operate more than a suspension?] The term is gone. The lord having no valid grant of it, it goes to the reversioner. In Cruise's Digest, Title x., Ch. vi, which treats of "Extinguishment and Suspension of Copyholds," it is said (pp. 324–326), "Copyhold estates may be destroyed in several ways; for, whenever an estate of this kind ceases to be held by copy of court-roll according to the custom of the manor, it is said to be extinguished and gone. Thus, if a copyholder surrenders his estate to the lord, to the use of the lord, the copyhold is thereby extinguished. It is, however, necessary in a case of this kind that the lord to whom the surrender is made have a lawful estate in the manor; for, a surrender by a copyholder to a person who is possessed of the manor by wrong, will not operate as an extinguishment of the copyhold. A bishop having been disseised of a manor during Cromwell's usurpation, a copyholder surrendered to the disseisor, ut inde faciat voluntatem suam. After the restoration, the bishop entered. Resolved, that the copyhold was not extinguished, because the surrender was void: *Pitt v. Moore*, 2 Show. 156. Lord Chief Baron Gilbert says (Ten. 254), if a surrender be made to the lord, expressing no use, it shall be to the use of the lord; for, it cannot be imagined that the surrender was made to no \*end or purpose; and a surrender [\*400 may be made to the lord, and no use need be expressed. It is [\*400 said in Comyn's Digest, *Copyhold* (F. 8.), that, in such a case, the lord shall have it to the use of the surrenderor. But it is laid down by Lord Holt (*Fisher v. Wigg*, 1 P. Wms. 17, 1 Ld. Raym. 627), that, if a copyholder surrenders to the lord without declaring a use, the copyhold extinguishes; as, on a surrender by tenant for life to him in reversion. Where a copyhold is thus surrendered to the lord, the land continues to be part of the demesnes of the manor, freed from that customary right of occupation which the copyholder had in it, and will pass by any conveyance of the manor. Thus, it was resolved in a modern case (*Doe d. Gibbons v. Pott*, 2 Dougl. 709), that, if a lord of a manor mortgage the manor in fee to A., and afterwards purchase copyholds held of the manor, and take surrenders of them to himself in fee, they shall enure to the benefit of the mortgagee. And a settlement by the lord of all his estate mortgaged to A. shall pass the equity of redemption of such surrendered copyholds. In a subsequent case (*St. Paul v. Dudley and Ward*, 15 Ves. 167), it was held by Lord Eldon, that, where the lord of a manor was tenant for life, with remainders over, and purchased a copyhold held of the manor, taking the surrender to him and his heirs, it was extinguished, and as parcel of the manor became subject to the limitations of it. If a copyholder releases all his estate and interest to the lord of the manor, it will operate as an extinguishment of his copyhold: for, a release cannot in its own nature pass away a possession, yet it may amount to a signification of the tenant's intention to hold the lands no longer; and the rule is, that everything amounting to a determination of the copyholder's will to hold no longer, \*extin- [\*401 quishes the copyhold.(a) So, if the lord conveys away the freehold of a copyhold to a stranger, and the copyholder releases

(a) Gilb. Ten. 300; *Blommer Hassett v. Humberstone*, Hutton 65, Sir W. Jones 42 (*Blewer-hasset v. Humberstone*), Winch R. 66 (*Hassett v. Hanson*).

to the stranger, this will also extinguish the copyhold: but, if a copyholder be ousted, and so the lord disseised, and the copyholder releases all his right to the disseisor, it will have no effect, because the disseisor has no customary estate on which the release of the customary right may enure: Wakeford's Case, 1 Leon. 102; Wilson v. Allen, 1 Jac. & W. 611; Mortimore's Case, Hetley 150; Gilb. Ten. 300. Any conveyance of the land by the lord to the copyholder, for an estate of freehold, or even for a term of years, will extinguish the copyhold: for, the estate of the copyholder, being only at will, becomes merged by the accession of any greater estate: Co. Cop. s. 62. If the lord demises land held by copy to a stranger for years, and the stranger assigns over his term to the copyholder, the copyhold will be thereby extinguished; for, both these interests cannot exist in the same person simul et semel; and consequently one of them must be determined, which of necessity must be the customary estate; for, the estate derived from the common law cannot merge in that; and, when common law and custom come together, and one or the other must necessarily stand, the common law shall be preferred: Lane's Case, 2 Co. Rep. 16 b. It was resolved upon the same principle (Hide v. Newport, Moore 185; French's Case, 4 Co. Rep. 31 b), that, where a copyholder in fee took a lease for years of the manor, the copyhold was extinct for ever, and not during the continuance of the lease only." In Bingham v. Woodgate, 1 Russ. & M. 32, it was held by Sir John Leach, M. R., that, where a customary \*402] tenement \*is freehold, and the lord, being only tenant for life of the manor, purchases the fee of the customary tenement, the seignior is suspended during the life of the lord, but revives at his death, and the customary tenement descends to his heir. In Doe d. Gibbons v. Pott, 2 Dougl. 709, 720, Lord Mansfield says: "After the mortgage, the mortgagee in fee had a right to the manor and everything held of it as parcel thereof. In notion of law, the mortgagor was only tenant at will, or, at most, from year to year. He had the lowest estate possible. In equity, he was lord of the manor, subject to the charge upon it; but he could do nothing to weaken the security. In both views it is clear what he could do in consequence of the surrenders. He had the opportunity, if he had been absolutely tenant in fee, either to continue the copyholds as parcel of the manor,—by granting them out again by copy of court-roll, because the custom is not broken by their merely having continued in the lord's hand, but they may notwithstanding be alleged to have been demised and demisable by copy of court-roll, which is all that is necessary,—or to sever them from the manor by any common-law conveyance, as, a lease, &c. But, the manor being mortgaged in fee, he could not sever them, because *that* would have diminished the security; for the mortgagee had a right to the services, quit-rents, escheats, forfeitures, and other casualties." [WILLES, J.—That was a peculiar case. The mortgagee has all the interest which the mortgagor had. The copyhold was not absolutely extinguished; otherwise there could be no regrant. WILLIAMS, J.—What is the principle which enables the lord to make a voluntary grant?] It depends on custom. In 1 Scriven on Copyholds, p. 91, it is said: "The law does not regard either the quality of the person of the lord, or the quantity of his

estate; for, although he be not \*sui juris, or be seised of a limited interest only, yet may he make a voluntary grant in fee or for such estate as is authorized by the custom of the manor, which grant would be good, notwithstanding the interest granted should continue longer than that of the lord; for instance, the infancy, idiotcy, or lunacy of the lord of the manor,—or his being an outlaw, an excommunicate, a feoffee on condition, guardian in socage, tenant in tail, for life, or for years or even at will; tenant by the courtesy, by statute, or by elegit; or his being a bishop or other ecclesiastic seised in right of his bishopric or church,—will not disable him from making a voluntary grant; and, in the latter case, the grant would be good even against the King, on the vacancy of the see. So, a grant by a doweress, or by the husband seised in right of his wife, is equally good to bind the inheritance or other estate authorized by the custom; but, in the latter instance, the wife's joining is essential; and this because it is not the husband alone, but both husband and wife that are seised in right of the wife." For all these propositions the learned author cites abundant authorities. In Coke's Copyholder, edit. 1764, p. 69, it is said: "The reason of the law is this:—A copyholder upon voluntary grants made by copy doth not derive his estate out of the lord's estate only, for then the copyholder's estate should cease when the lord's interest determineth: nam, cessante primitivo, cessat derivativas: but the life of the copyholder's estate is the custom of the manor: and therefore, whatsoever befalleth the lord's interest in his manor, be it determined by the course of time, by death, by forfeiture, or other means, yet, if the lord were legitimus dominus pro tempore, how small soever his estate was, that is enough; for, the same custom that fixeth a copyholder instantly in his land upon his admittance, will likewise preserve \*and protect his interest to the end, in such manner that, though the lord's interest faileth, yet his shall never fall to the ground, being upheld by such a prop, such a pillar." In Watkins on Copyholds, 4th edit. by Coventry, Vol. 1, p. 423 [354], it is said, that, "if A. be a copyholder in fee, and accept a common-law lease for years of the premises, or a lease for years of the entire manor, his copyhold interest will be extinguished. Or, if A. be lessee of the manor, and B. a copyholder in fee, and B. bargain and sell his copyhold to A. and his heirs, the copyhold interest shall be extinguished for ever." "So (note y), if he surrenders to a lessee for years of the manor, to the use of the same lessee, the copyhold will be extinguished:" Godb. 101, Case 117. And in note (1) p. 424, it is said: "A question has occurred, whether, upon the descent of a copyhold in fee to a person having already the fee of the manor by purchase subject to a lease of it for years, the lessee be entitled to call upon the tenant (his landlord) on whom the copyhold in fee has so descended, to come in and be admitted and pay to the lessee, as lord of the manor, the customary fines. Mr. Hargrave considered that an absolute extinguishment in this case would work great injustice to the lessee, yet, from the invincible nature of the rule that one person cannot be both lord and tenant at the same time, he doubted whether, in strictness of law, such an effect would not be produced. But he thought it probable that a court of equity would relieve against the extinguishment, if

that were really the effect at law, and particularly from the circumstance that the conveyance of the manor to the lord and tenant was expressly subject to the existing lease." In 1 Cruise's Digest, p. 269, it is laid down, that, "Whenever copyholds are transferred from one person to another, or descend to an heir, a new grant is also made by \*405] the \*lord; so that, in fact, every copyhold is held by grant from the lord. But, in those cases, the grantee must be admitted in the lord's court, and the admittance, in which the new grant is contained, entered on the rolls; upon which the title of the grantee entirely depends. All those who have any estate in a manor, though it be only for years or even at will, may regrant a copyhold which escheats or comes to them in any other way; reserving the ancient rents, customs, and services. And such grant shall bind the lord who has the inheritance of the manor; for, each of them is dominus pro tempore, and within the custom. The reason is, that a copyholder does not derive his estate out of that of the lord only, for then the copyhold interest would cease with the estate of the lord; but from the custom."

As to the effect of the deed of 1833,—it will be said that the general words are sufficiently extensive to convey all that the Duke had. Upon the face of it, this deed does not show what the trusts were. The subsequent conduct of the Duke is as if no such deed existed. Two renewals of the term are afterwards obtained, no notice being taken of the deed of the 1st of August, 1833. The Duke would be estopped from saying that these leases were bad: *Davison v. Gent*, 1 Hurlst. & N. 744. [WILLES, J.—Is there any one of these grants which, if made to a third person, would have been good as against the Dean and Chapter?] It is submitted not. Lord Coke, commenting upon the words "seised of a manor," in s. 73 of Littleton, says,—Co. Lit. 58 b,—“Although the word be ‘seised,’ which properly betokeneth a freehold, yet tenant for years, tenant by statute merchant, staple, elegit, and tenant at will, guardian in chivalrie, &c., who are not properly seised but possessed, are domini pro tempore, not only to make \*406] admittance, but to grant voluntary copies of \*antient copyhold lands which come into their hands. And therefore there is a diversity between disseisors, abaters, intruders, and others that have indefeasible titles; for, their voluntary grants of antient copyhold lands should not bind the disseisees or others that right have. And voluntary grants by copy made by such particular tenants as is aforesaid shall bind him that hath the freehold and inheritance, because all these be lawful lords for the time being: but so is not a tenant at sufferance, because he is in by wrong, as hath been said: and so was it adjudged P. 29 Eliz., inter *Rous et Arters*, 4 Co. Rep. 24. But admittances made by disseisors, abaters, intruders, tenants at sufferance, or others that have defeasible titles, stand good against them that right have, because it was a lawful act, and they were compellable to do them.” The distinction was acted upon in *Doe d. Burgess v. Thompson*, 5 Ad. & E. 532 (E. C. L. R. vol. 31), 1 N. & P. 215. There, copyhold property in a manor belonging to the see of Ely was surrendered to B., who was admitted on this surrender at a court purporting to be a court of Joseph, Bishop of Ely, lord of the manor. At the time of the admission, no grant of the temporalities had been

made to Joseph since the death of the preceding bishop, nor had Joseph been confirmed. It was held that the admission was nevertheless good, the lord's title being immaterial, since the admission was not a voluntary act, but in pursuance of a surrender. So, in *Harris v. Jays*, Cro. Eliz. 699, it was held that a voluntary grant by one who was steward de facto only, was bad; though it would have been otherwise if it had been a thing of necessity. For these reasons, it is submitted that these voluntary grants are void, and the plaintiffs are therefore entitled to recover.

Hearn's case,—the grant of April 2, 1840,—differs slightly from the others; but not in any important particular. The same principle is involved in all.

\**C. Hall* (with whom was *Murray*), contra.—The objection is one of a purely technical character. If the grants had been [\*407 to a trustee for the Duke, there would have been no difficulty. The general principle relied on for the plaintiffs is not disputed: but the authorities cited have little or nothing to do with the present question. The real question is, what is the operation of the deed of the 1st of August, 1833, upon the then-existing lease held by the Duke of Buckingham. It is submitted that the property comprised in it passed by that deed to the trustees, and that the acceptance of the lease subsequently created no estoppel binding on the Duke or his successors. It is contrary to principle to set up an estoppel where the parties are not in the relative position of lessor and lessee. In Co. Litt. 47 b, it is said, that, "If a man take a lease of his own land by deed indented reserving a rent, the lessee is concluded. But, if a man takes a lease of the herbage of his own land by deed indented, this is no conclusion to say that the lessor had nothing in the land, because it was not made of the land itself: but, if a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended; for, by the making of the lease, the estoppel doth grow, and consequently by the end of the lease the estoppel determines, and that part of the indenture which belonged to the lessee doth after the term ended belong to the lessor, which should not be if the estoppel continued." *James v. Landon*, Cro. Eliz. 36, is an authority to the same effect; and so is *Cuthbertson v. Irving*, 4 Hurlst. & N. 742. Whether Hearn's grant was good or not, is a matter of indifference; for, if the reversion were vested in Hearn, he sold to the defendant. There is nothing in law to invalidate the surrender and admittance. As to the other two, the true character of the Duke was that of agent for \*the trustees. [\*408 The relation between them was that of mortgagor and mortgagee, or trustee and cestui que trust. He stands precisely in the position that the plaintiff in *Melling v. Leak*, 16 C. B. 652 (E. C. L. R. vol. 81), stood in. *Cresswell, J.*, in delivering the judgment of the court there says, that, "although it may be well argued, on general principle, as well as on the authority of *Garrard v. Tuck*, 8 C. B. 231 (E. C. L. R. vol. 65), that a cestui que trust who is in possession with the consent, or even the mere acquiescence, of the trustee, must be regarded as his tenant at will, yet this doctrine (as is observed in the excellent note of Messrs. Morley and Coote, in their edition of *Watkins on Conveyancing*, p. 19) applies only to the case where the

cestui que trust is the actual occupant. If he is only allowed to receive the rents or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees, who choose to allow him to act for them in the management of the estate." Whether the renewed leases were valid or not, the Duke would take them bound in equity with a trust for the trustees of the deed of 1833. But it is not necessary to rely on that; for, we find the Duke acting as lord, holding courts, and making grants, and doing other acts as agent for the trustees. No authority is to be found bearing very accurately upon the matter: certainly there is none against the defendant's contention. [WILLIAMS, J.—Do you say that we are to take it that the Duke, in continuing to exercise the functions of lord, did so as agent of the trustees?] Yes. [WILLIAMS, J.—That is a question of fact. He was clothed at the time with the character of lessee, and is found holding courts in his own name. Is not that inconsistent with the fact which you wish us to assume?] No new lease was made to the defendant when he executed the two grants of 1840. [WILLIAMS, \*J.—As between \*409 the Dean and Chapter and the Duke, he was lord of the manor.] It is submitted that the Duke is not estopped from showing the true state of things: *Portman v. Willis*, Cro. Eliz. 386. The subject is discussed in *Williams on Executors*, 5th edit. 1245, and in *Sheppard's Touchstone* 454. [WILLIAMS, J.—The court-roll describes the Duke as "farmer of the Dean and Chapter of Christchurch, Oxford, lord of the said manor."] It is not necessary to name the lord of the manor at all. It is said that these grants are void, being made by a tenant at will to himself. But the answer is obvious: as the defendant could not act in both capacities, the very act of assuming to grant must be a determination of the tenancy at will: *Co. Litt.* 57 a; *Birch v. Wright*, 1 T. R. 378, 382. Each tenant, therefore, would have held as copyholder, and not as tenant at will. That applies to the two grants of 1840. As to the grant of 1845, it was not a grant by the lord to himself.

*Hayes*, Serjt., was heard in reply. (a)

ERLE, C. J.—I am of opinion that our judgment in this case should be for the plaintiffs, the Dean and Chapter of Christchurch, Oxford, who are lords of the manor of Maidsorton. The case turns upon the validity of certain grants and admittances to copyhold tenements of the manor, made by the Dukes of Buckingham who preceded the now Duke, the defendant. I am of opinion that nothing passed by \*410 those grants, \*because at the respective times when they were made the Duke was lessee of the manor, and so the grant was in effect a grant by the lord to himself; and I take it to be clear that such a grant would not pass any estate. In *Viner's Abridgment, Copyhold* (N. 1), pl. 8, is an authority straight to the point,—“A man cannot be a copyholder unto a manor whereof he himself is lord, although he be but dominus pro termino annorum, or in jure uxoris:” *Calth. Reading* 58. This is perfectly clear, and indeed it was not

(a) At the close of the argument, *Willes, J.*, called the attention of the parties to the omission to number the paragraphs of the special case in accordance with the rule of *Hilary Term*, 1862, which disentitles the attorneys to the costs of drawing and copying, without the special order of the court. See 11 C. B. N. S. 477 (*E. C. L. R.* vol. 103).

disputed in the able argument of Mr. Hall. I do not say that the copyhold by the grant becomes merged, nor do I say that it was extinguished or put an end to; because it is clear that it may still be capable of being regranted, though suspended for a time. If therefore the case had stood there, it is agreed on all hands that the plaintiffs would be entitled to judgment. But the main argument on the part of the defendant has been as to the effect of the deed of August 1st, 1833,—whether it had the effect of preventing the Duke from being lord of the manor at the time.

By that deed the Duke (Richard Grenville) granted all the manors, messuages, lands, tenements, tithes, and other hereditaments of or to which he was possessed or entitled at law or in equity for any term or terms of years beneficially, and not as mortgagee or trustee, to Sir Thomas Francis Freemantle and James Buller East, upon certain trusts. If they had granted the copyhold tenements to the Duke, the grant might have been valid. But that deed is put forward for the purpose of showing that the Duke at the time he made these grants had nothing in the manor. There is, however, a difficulty about that, because, if the Duke had nothing in the manor, no estate could pass by his grant. The main strength of Mr. Hall's argument has been that the trustees under the deed of the 1st of \*August, 1833, must be taken to have allowed the Duke to act as their agent, [\*411 and that the grants must be taken to be grants by the trustees by their agent. That would, however, be a question of fact. But it is not found as a fact in the case: and every fact which is stated in the case in relation to this matter negatives that there was any intention either on the part of the Duke or the trustees that there should be a grant taking any operation from the trustees or by their authority. Certain it is, that, after the deed of August, 1833, granting the Duke's interest in this manor, amongst other things, to the trustees, every act done with reference to the estate is inconsistent with the notion that the trustees intended to authorize the cestui que trust to act for them, or that the cestui que trust considered himself their agent; for, in December, 1833, the then Duke (Richard Grenville) takes from the Dean and Chapter a new lease of the manor; and at the expiration of about seven years of that term another renewal is made to his successor Richard Plantagenet, the late Duke. In all these, the Duke is treated as the lord farmer of the manor: and courts have been held in the name of the Duke as lord farmer, at which surrenders and admittances have taken place, without a sign of the trustees having ever assumed to exercise any right over the manor or ever interfered in any way with what was being done. It seems to me, therefore, that the defence founded upon the deed of the 1st of August, 1833, fails, and that that deed may be considered as altogether out of the case. It comes then to the undisputed proposition that a grant by the lord of a manor of a copyhold tenement to himself is void and operates nothing. For these reasons, therefore, I come to the conclusion that the plaintiffs are entitled to judgment.

\*WILLIAMS, J.—I am of the same opinion. The question [\*412 that is submitted for our consideration in this case, is, whether all or any and which of the grants mentioned therein are effectual and valid or not. Had it not been for the argument founded upon the



assignment of the 1st of August, 1833, which was urged by Mr. Hall with considerable learning and ingenuity, it could not for a moment be contended,—indeed, it was so conceded,—that these grants could be sustained, because it is plain that they would be in violation of the principle upon which the dictum in Viner's Abridgment, *Copyhold* (N. 1), pl. 8, to which my Lord has referred, viz. that a man cannot be a copyholder of a manor whereof he himself is lord, is founded. But then it is said that, admitting that principle, this is not the case of a man being a copyholder to himself, because that assignment put the trustees in the place of the Duke with reference to the lease of the manor, and, the trustees having allowed the Duke, notwithstanding that assignment, to continue in the enjoyment of the property assigned, all his acts in relation thereto must be referred to an authority conferred upon him by them to act as their agent. Now, it may be and no doubt is the law, that, if a mortgagor is allowed by the mortgagee to remain in possession, and nothing else appears in the case, you may assume acquiescence on the part of the mortgagee, and that the acts of the mortgagor are acts done by him as his agent. But that rule has no application where, besides the fact of the mortgagor continuing in possession, there are other facts in the case which are wholly inconsistent with the presumption of such agency. It appears to me that there are abundant facts here to show that the successive Dukes did the several acts in question, not in the character of agents to the trustees, but in that of lessees of the manor. When the leases became \*418] \*renewable at the expiration of each period of seven years, the renewed lease was made, not to the trustees, but to the then Duke. And, from the fact of their taking these renewals, and holding courts baron avowedly in the character with which such renewed leases invested them, and from the other circumstances adverted to by my Lord, it is plain that we should be violating the truth if we were to draw the inference that the grants were made by the Dukes of Buckingham in the character of agents for the trustees under the deed of the 1st of August, 1833. For these reasons, I think the ingenious argument presented by Mr. Hall fails, and that the rule of law must prevail.

WILLES, J.—I am of the same opinion. It appears to me that the defendant can derive no advantage from the deed of the 1st of August, 1833. Upon the face of the grants, the grantor intended and professed to grant to himself. Such a grant is void for obvious reasons, and on established authority. Can, then, a person who has attempted to grant in that informal mode make the grant valid by showing that in fact the manor was vested in trustees for him? It is insisted that he may, though the trustees did not in any way actively interfere. It is said, that although, in respect of property in the actual possession of the cestui que trust, not interfered with by the trustees, the former is to be considered as tenant at will to the latter, yet, in respect of property of which the cestui que trust is not in actual possession, but of which he receives the rents and profits, the relation of the parties is not that of landlord and tenant at will, but that of principal and agent. I am quite prepared to admit that ordinarily that would be so. This court recently, in a case of *Snell v. Finch*, 13 C. B. N. S. 65 (E. C. L. R. vol. 106), applied the doctrine

of *Trent v. Hunt*, 9 Exch. 14,—where it was \*held, that, if a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, he during such permission is presumptione juris authorized, if it should be necessary, to realize the rent by distress, and to distrain for it in the name of the mortgagee, as his bailiff,—to the case of trustee and cestui que trust under circumstances similar to those in the case cited by Mr. Hall of *Melling v. Leak*, 16 C. B. 652 (E. C. L. R. vol. 81). I do not therefore doubt that ordinarily that would be so, and that such a state of things might be inferred from the trustees not interfering, without proving any actual authority from them. But I do exceedingly doubt the applicability of that law to the case of trustee and cestui que trust of a manor. A manor does not consist of mere rents and profits. It is a feather in the cap of the lord. The person entitled as lord has many things to do that are of more consequence than the mere receiving of rents and fines. He has officers to appoint, and courts baron to hold,—things which may well be considered capable of actual possession and enjoyment. I should therefore be disposed to hold the case different from that of a mere trust to receive rents and profits. I should have thought that the proper conclusion to arrive at, if the matter were properly examined into, would be, that the cestui que trust, being allowed by the trustees to exercise the functions of lord of the manor, would be more properly called tenant at will to them, rather than agent, and must be considered to have done all he did as lord de facto. But I do not know that it is at all necessary to pronounce any absolute opinion upon that, because, for the reasons stated by my Brother Williams, this being a question of fact, and the case being altogether bare of any suggestion of authority in the Duke of Buckingham to act as agent for the trustees named in the deed \*of the 1st of August, 1833, but, on the contrary, that instrument containing much to suggest a strong suspicion that neither the Duke nor the trustees ever entertained a notion that this manor was affected by it, I entirely agree that it would be a strained and false conclusion for us to hold that the Duke, professing to act for himself as lessee and farmer of the Dean and Chapter of Christchurch, was in reality acting as the agent of the trustees, so as to make good a grant which upon the face of it is void for sinning against the rule of law which has been so well laid down. Upon the best consideration, therefore, which I have been able to bring to this case, I am of opinion that the deed of 1833 must be considered as being out of the question: and that makes an end of all the grants except that made to Hearn in April, 1840. That was an existing interest purchased by the Duke for the sum of 800*l*. There certainly is apparent justice in saying, that, if possible, the mere slip of the Duke in having that conveyed to himself, instead of conveying it to trustees for his use, should not deprive him of the benefit of his purchase: and I should hope that the reversioners will not attempt to take advantage of that slip, so as to reap an advantage to which in equity and fairness they are not entitled. As to the others, they may be looked at as casual profits: but, as to this, I should have been glad if we could have held, as in the case of freeholds (upon a tenure created before the statute of *Quia Emptores*) that

the fact of the purchase of the interest of the tenant by one who has only a partial interest in the manor should operate by way of suspension only, as in *Littleton*, s. 560; so that the Duke would be entitled, apart from the grant, and waiving the grant, inasmuch as it could not be effectual. But I find it impossible to apply that doctrine (which is so reasonable and expedient as to freeholds) to the case of a \*416] copyhold which \*has got into the hands of the lord. That seems to be a case in which you are not put to choose between suspension and extinguishment. There is no extinguishment; because, although the lord may enjoy the estate, yet the tenancy retains its demisable character, and may be regranted by the lord, to hold according to the custom. The result appears to me to be, that when the copyhold gets into that condition, the lord has a right to regrant it. That right the Duke here did not effectually exercise during the existence of the lease; and, now that the lease has run out, neither he nor his heirs can exercise the right. I have gone thus at large into the reasons which have induced me to come to this conclusion, because I certainly have struggled hard against arriving at it. But I feel that the law compels me to do so. On these grounds, I agree with my Lord and my Brother Williams that our judgment must be for the plaintiffs.

BYLES, J.—I am of the same opinion. I feel the force of what has been said by my Brother Willes with regard to Hearn's case; but I take it for granted that that will be settled before another tribunal. Here, we have only to deal with a dry point of law. I am not prepared to say that the lease of the manor is still a subsisting lease: it is not so, if there was an entry as upon a condition broken, which would put an end to it. Now, the lease contains a proviso that the Duke shall not alienate, sell, or assign over his estate for the term of years, or any part thereof, without the special license and consent of the Dean and Chapter. It does not go on to say what shall be the consequence if he does so; and I am not at all prepared to say what would be the consequence,—whether the lease would be absolutely void, or voidable only upon entry. In one part of his argument, Mr. \*417] Hall fell somewhat \*inadvertently into an admission that the lease would be void for the condition broken. He, however, retraced his steps: and possibly it may not be so: but, at all events, it would be voidable, if there be an entry; and, as a man may distrain for one thing and avow for another, so, if he has a right to enter, whatever might be his intention in so doing, he may afterwards justify himself in an action of ejectment for so doing. Now, what was done here? After the condition broken, a new lease was sealed, under which the Duke entered. The original lease was thereby put an end to. It may be observed that this is the only way in which effect can be given to the transaction; because the two subsequent leases have always been treated by both parties as good, and I can conceive no other means by which that can be, than by the original lease being considered to have been put an end to. As at present advised, therefore, it seems to me that the lease assigned to Sir Thomas Freemantle and James Buller East, the trustees under the deed of the 1st of August, 1838, was put an end to; that the subsequent leases were good; and that the admittance by the Duke of himself is void,

it being impossible that he could at the same time be both lord and tenant. The entry upon the court-roll is, that the lord, by his steward, grants to his own use. That being, so, the transactions are void, Hearn's as well as the others; and, the lease to the Duke having expired by effluxion of time, the Dean and Chapter were entitled to enter.

All this proceeds upon the supposition that the lease conveyed to the trustees was put an end to. But, supposing that lease to be still subsisting, what is to follow? I have taken an opportunity, whilst the argument was proceeding, of looking through the court-rolls of the manor from the year 1800, in the time of the predecessor in estate of the Duke of Buckingham. \*In all these entries the Duke [418 treats himself as lord farmer of the manor. Nothing that was done by him professes to be done by him as agent for the trustees. The utmost that can be made of it is, that he had some scintilla of interest. Possibly he might not have been a wrongdoer, though I should incline to think he was an abater or an intruder. The authorities cited by Mr. Hall would seem to show that he was a wrongdoer. If so, a regular admittance might be good. But this admittance was not regular; and an informal or irregular admittance by a mere wrongdoer never can be good. This is a *grant* by a wrongdoer to himself. There is no evidence that it was made by him as agent, but, on the contrary, strong evidence that it was not. The plaintiffs, therefore, are clearly entitled to judgment.

Judgment for the plaintiffs.

### MARSH v. CONQUEST. June 8.

1. It is competent to the assignee of "the sole right of representing" a dramatic piece to sue for penalties under the 3 & 4 W. 4, c. 15, s. 2, notwithstanding the assignment is not by deed or registered under the Copyright Act, 5 & 6 Vict. c. 45.

2. The defendant, the proprietor of a theatre, let it for one night for the benefit of one of his performers, who was to pay him 30*l.* for the use of it for that night, together with the services of the corps dramatique, band, lights, and accessories. The performer who so had the use of the theatre represented therein a dramatic piece the sole right of representing which had been assigned to the plaintiff:—Held, that the defendant "caused the piece to be represented," and consequently was guilty of an infringement of the plaintiff's right, and liable to the penalty imposed by the Dramatic Copyright Act, 3 & 4 W. 4, c. 15, s. 2.

3. The assignment of the copyright of a book consisting of or containing a dramatic piece does not, in the absence of an expressed intention that it should do so, pass the right of representing or performing it. That may be the subject of a subsequent assignment to a third person.

4. A plaintiff is entitled to costs under the 15 & 16 Vict. c. 54, s. 4, though he obtains a verdict for 40*s.* only, if his permanent place of residence is more than twenty miles from the place where the plaintiff dwells or carries on his business, although at the time of the commencement of the action he was for a temporary purpose residing within that distance.

THIS was an action for a breach of the Dramatic Copyright Act, 3 & 4 W. 4, c. 15.

The first count of the declaration stated that the \*plaintiff [419 was the proprietor of and had the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment in any part of the united kingdom, &c., a dramatic piece called "Spring-heel'd Jack, the Flying Highwayman, or The Mysteries

of the Old Red Grange," as the assignee of the author thereof, which dramatic piece had been and was composed after the passing of the 3 & 4 W. 4, c. 15 (the Dramatic Copyright Act), by one Douglas Stewart; yet that the defendant, during the continuance of such sole liberty, and within twelve calendar months before the commencement of the suit, contrary to the intent of the statute in such case made, and the right of the said plaintiff as such assignee as aforesaid, wrongfully represented and caused to be represented, without the consent in writing of the plaintiff first had and obtained, at certain places of dramatic entertainment in England, the said production and divers parts thereof; whereby the defendant became liable for each and every of such representations to the payment to the said plaintiff of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever was the greatest damage: Averment, that the full amount of the benefit and advantage arising from each of such representations was the greater damage, and the sum payable by the defendant to the plaintiff by reason of the premises.

The second count was similar to the first; but averred that 40s. for each of the said representations was the greater damage, and the sum payable by the defendant by reason of the premises.

The defendant pleaded,—first, not guilty,—secondly, that the plaintiff was not the proprietor of, nor had he the sole liberty of representing or causing to be \*represented the said dramatic piece, \*420] as alleged. Issue thereon.

The cause was tried before Bramwell, B., at the Surrey Spring Assizes, 1863. It appeared that one Stewart, in January, 1863, wrote the "dramatic piece" mentioned in the declaration for the plaintiff, who suggested the plot and incidents, and that Stewart assigned to the plaintiff the sole right of representation, by a writing of which the following is a copy:—

"January 10th, 1863.

"I hereby assign to Mr. Boleno Marsh the sole and entire right of performing in town or country the drama of Spring-heel'd Jack for the sum of 2*l*.

"Received the above,

DOUGLAS STEWART."

There was no assignment by deed, nor was there any registration pursuant to the 22d section of the Copyright Act, 5 & 6 Vict. c. 45.

The defendant was the proprietor of the Grecian Theatre, in the City Road; and it was proved that Spring-heeled Jack was performed at that place on one evening after the date of the above assignment. It appeared, however, that, upon the occasion of such representation, the defendant had let the use of his theatre for the night, together with the properties, scenery, actors, and lights, to his son George Conquest, the stage-manager, for his benefit, the latter paying 30*l*. for the use of the house, &c., and selecting his own pieces; and that the son obtained from Stewart a license for a representation for that night.

Under these circumstances, it was contended, on the part of the defendant, that, inasmuch as he had no control over the performances for that evening, he could not be held guilty of representing or causing to be represented the plaintiff's drama. And it was further con-

tended that the plaintiff was not entitled to \*recover, because there was no valid assignment of the right of representation, [\*421 and no registration under the act.

The learned Baron thereupon nonsuited the plaintiff, reserving him leave to move to enter a verdict for 40s. if the court should be of opinion, that, notwithstanding these objections, he was entitled to recover.

*Montagu Chambers*, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly.

*Lush*, Q. C., in Hilary Term last, showed cause.—The defendant has been guilty of no violation of the statutes. It was expressly held by this court in *Russell v. Briant*, 8 C. B. 338 (E. C. L. R. vol. 65), that no one can be considered as an offender against the provisions of the Dramatic Copyright Act, so as to be liable to an action at the suit of the author or proprietor, unless he, by himself or his agent, actually takes part in the representation which is a violation of the copyright: and therefore, that one who merely lets a room to the offender is not liable, even though he supplies the benches and lights, or sells a ticket of admission, himself deriving no other profit than that arising from the letting of the room. *Wilde*, C. J., in delivering the judgment of the court, said, that, "if it were to be held that all those who supply some of the means of representation to him who actually represents, are to be regarded as thereby constituting him their agent, and thus causing the representation within the meaning of the act, such a doctrine would embrace a class of persons not at all intended by the legislature." And that is followed by *Lyon v. Knowles*, 3 Best & Smith 556 (E. C. L. R. vol. 118). There, *Knowles*, the licensed proprietor of a theatre, under the 7 & 8 Vict. c. 68, entered into an arrangement with one *Dillon* whereby *Dillon* had the use of \*the theatre for dramatic entertainments. *Dillon* provided the company, had the selection of the pieces to be represented, [\*422 together with the entire management of their representation, and exclusive control over the persons employed in the theatre. *Knowles*, on his part, paid for printing and advertising, furnished the lighting, doorkeepers, scene-shifters, and supernumeraries, and hired the band, music being a necessary part of the performance. The money taken at the door was taken by servants of *Knowles*, who retained one-half of the *gross receipts* as his remuneration for the use of the theatre, and handed the other half to *Dillon*. Among the pieces represented were two which *Lyon* had the sole liberty of representing or causing to be represented, &c., as assignee of the author, under the Dramatic Literary Property Acts 3 & 4 W. 4, c. 15, and 5 & 6 Vict. c. 45,—and it was held that no action under these statutes was maintainable by *Lyon* against *Knowles*, as the above facts did not show that those pieces had been represented, &c., by him, or that there was a partnership between *Dillon* and him so as to render him liable for the representation, &c., of them by *Dillon*. "If," said *Cockburn*, C. J., "*Dillon* and his company could be in any sense regarded as the company of the defendant, he might be considered as representing or causing to be represented the piece in question. But the facts are quite otherwise. As I understand the evidence, the defendant made over to *Dillon* the use of this theatre, to perform therein with his company

such pieces as he should be minded to represent there. All that the defendant did, was, to stipulate that his servants should receive the proceeds, in order that the remuneration which he contracted for should be secured to him. But the theatre, with its accessories, lights, band, &c., were under the direction and control of Dillon, and the defendant had \*423] \*divested himself both of the right to interfere in the choice of the pieces to be represented, and of any veto to be exercised by him as to providing, acting, or representing any particular piece. The defendant is nothing more than the proprietor of the theatre, who has transferred for the time the exercise of all his rights in it as such to Dillon." The next question is one of some nicety, upon the construction of the statutes. The facts are these:—The plaintiffs procured Stewart, a dramatic author, to write for him the piece in question, and Stewart, in consideration of 2*l.*, by parol assigned to the plaintiff "the sole and entire right of performing" it in town or country. In the absence of a due assignment by deed, and registration under the act, the plaintiff can have no title. Now, the author of a dramatic piece may assign the copyright, retaining the right of representing or causing it to be represented; but he cannot assign the right to represent, and retain the copyright: or, if he has assigned the copyright, he cannot afterwards make a separate assignment of the right of representing. The 1st section of the 3 & 4 W. 4, c. 15, enacts that "the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed *and not printed and published by the author thereof or his assignee*, or which hereafter shall be composed *and not printed or published by the author thereof or his assignee*, or the assignee of such author, shall have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever in any part of the united kingdom, &c., any such production as aforesaid *not printed and published by the author thereof or his assignee*, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production printed and published within ten years \*424] before \*the passing of this act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of passing this act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing or causing to be represented the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof. In *Shepherd v. Conquest*, 17 C. B. 427 (E. C. L. R. vol. 84), the plaintiffs, the proprietors of a theatre, employed an author to compose for them a dramatic piece, paying him a weekly salary and travelling expenses: there was no contract in writing, nor any assignment or registry of the copyright, but a mere verbal understanding that the plaintiffs were to have the sole right of representing the piece in London: and it was held that the plaintiffs were not assignees of the copyright, nor had they such a right or interest therein as to entitle them to maintain an action for penal-

ties under the 3 & 4 W. 4, c. 15, s. 2. In *Cumberland v. Planché*, 1 Ad. & E. 580 (E. C. L. R. vol. 28), 3 N. & M. 537, it was held that a person to whom the copyright of a dramatic piece has been assigned previously to (and within ten years of) the passing of the 3 & 4 W. 4, c. 15, is an assignee within that clause of the act which gives to the author's assignee, in the case of a dramatic work published within ten years, the sole liberty of representing it,—the assignee taking, as Lord Denman observed, "the whole right of the author." The provisions and privileges of that act are extended by the 5 & 6 Vict. c. 45, the Copyright Amendment Act, s. 20, which,—after reciting the \*Dramatic Copyright Act, and that "it is expedient to extend [\*425 the term of the sole liberty of representing dramatic pieces given by that act to the full time by this act provided for the continuance of copyright, &c.," enacts that "the provisions of the said act and of this act shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof and his assigns for the term in this act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book." By s. 21, it is provided that the person who shall at any time have the sole liberty of representing such dramatic piece, &c., shall have all the remedies given and provided in the former act. And by s. 22, which was introduced in consequence of the decision in *Cumberland v. Planché*, it is enacted that "no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry-book [as provided by s. 11] shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment." That undoubtedly implies that the author may convey title to \*the copyright of the [\*426 book, and retain the sole right of representation: but, unless he reserves it, the sole right of representation is a property which is annexed to and follows the copyright of the book. There is no clause in the statute which creates a separate property in the right of representation, after the author has parted with the copyright of the book. The author may sell the copyright of the book; he may sell it with the sole right of representing; and he may sell the copyright of the book, reserving to himself the sole right of representation: but he cannot assign the right of representation, after he has parted with the copyright in the book. [ERLE, C. J.—It is clear, that, if the author sells the copyright of the book only, he retains the right of representation. Having, then, the right of representing, cannot he transfer that property?] Copyright is a peculiar property, the creature



of the statute; and, when the statute means that it shall be assignable, it says so, and points out the mode. [ERLE, C. J.—It is true that the sole right of representation did not exist at common law: *Murray v. Elliston*, 5 B. & Ald. 657 (E. C. L. R. vol. 7), 1 D. & R. 299.(a) But, the statute having made that a property, is it not subject to all the incidents of property, one of which is that it shall be assignable? Unless there be anything in the statute to prohibit it, I am prepared to hold that the power to assign the right of representation does exist.] \*Assuming it to be capable of assignment, \*427] it must at all events be registered. [ERLE, C. J.—The 24th section of the 5 & 6 Vict. c. 45 contains a proviso “that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the 3 & 4 W. 4, c. 15, or of that act, although no entry shall be made in the book of registry.] It may be that the author may maintain an action without registration: but the question is whether an assignment unregistered can confer any title. If this be an assignable property, the assignment must either be by deed or by entry on the register, otherwise it is not valid: s. 13.(b) [ERLE, C. J.—That is only an enabling clause.] By s. 20 all the provisions of the statute in respect of registering are applied to the sole liberty of representing or performing any dramatic piece.

*Montagu Chambers*, Q. C., in Trinity Term, was heard in support of the rule.—This action is founded upon the second section of the 3 & 4 W. 4, c. 15, which imposes a penalty for performing dramatic \*428] pieces contrary to the \*act. It has been insisted on the part of the defendant, that, by reason of the enactment contained in the 22d section of the 5 & 6 Vict. c. 45, to entitle the plaintiff to recover, he must have registered the assignment. That point, however, is disposed of by the case of *Lacy v. Rhys*, 33 Law J., Q. B. 157, where it was held, that, where by the same deed the administrator of the author assigned to the plaintiff, after the passing of the 5 & 6 Vict. c. 45, the copyright and acting-right in a dramatic piece first published after the passing of the 3 & 4 W. 4, c. 15, the plaintiff can maintain an action for penalties under the latter act against the defendant for performing the piece without his license, within twenty-eight years of its publication, although the deed has not been regis-

(a) There, the manager of Drury Lane Theatre having publicly represented for profit Byron's tragedy of *Marino Faliero*, altered and abridged for the stage, without the consent of the assignee of the copyright, the latter applied for an injunction to restrain the defendant from continuing the representation; and, upon a case sent by the Chancellor for the opinion of the Court of King's Bench, the court certified that no action could be maintained for so doing.

See *Reade v. Conquest*, 9 C. B. N. S. 755 (E. C. L. R. vol. 99), and 11 C. B. N. S. 479 (E. C. L. R. vol. 103).

(b) “It shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the registry-book of the Stationers' Company of the title of such book, the time of first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright,” &c.; and “it shall be lawful for every such registered proprietor to assign his interest or any portion of his interest therein, by making an entry in the said book of registry of such assignment, and of the name and place of abode of the assignee thereof,” &c.: “and such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force, &c., as if made by deed.”

tered; as the plaintiff's right is under the 3 & 4 W. 4, c. 15, and there is nothing in the 5 & 6 Vict. c. 45, which renders registration necessary in the case of an assignment of such a right of representation. Cockburn, C. J., there says: "It seems to me that the 22d section of the 5 & 6 Vict. c. 45 has no application to the present case, because we have here an assignment not only of the 'copyright,' but of the 'right to represent.' The 22d section in its terms only applies to a case of an assignment of a copyright, and it is very plain that that legislative enactment was intended to correct what had formerly been an omission on the part of the legislature in a previous legislation on the subject, and upon which, by the exposition of this court in *Cumberland v. Planché*, 1 Ad. & E. 580 (E. C. L. R. vol. 28), 3 N. & M. 587, it was held that the assignment of the 'copyright' carried with it incidentally the exclusive right of representation. The 22d section was evidently intended to meet that decision, by enacting that no assignment of a copyright should carry with it the right to represent, unless there was an entry on the registry-book that it \*was the intention of the parties that the assignment should have that effect. That does not apply to a case in which there is in terms an assignment of the right of representation itself. Now, in this case, there was an assignment of the right of acting, as well as of the copyright: and it is not because the necessity of registration imposed by the 24th section applies to cases of assignment of copyright, that, in an assignment of a right to represent, the same necessity is in any way to be inferred." That is a decision expressly in point. The 24th section of the 5 & 6 Vict. c. 45 provides that nothing therein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the 3 & 4 W. 4, c. 15, or of this act, although no entry should have been made in the book of registry aforesaid. Then it is said, that, because the defendant had let the theatre for the night to his son for his benefit, and had no part in the selection of the pieces for performance, therefore he did not represent or cause to be represented the plaintiff's play: and in support of this proposition reliance is placed upon two cases, viz., *Russell v. Briant*, 8 C. B. 836 (E. C. L. R. vol. 65), and *Lyon v. Knowles*, 3 Best & Smith 556 (E. C. L. R. vol. 113). All that was decided in *Russell v. Briant*, was, that the mere letting a room, with the accommodation of lights and benches, did not constitute an offence within the act. And in *Lyon v. Knowles*, the defendant was sought to be charged by reason of his having let the use of his theatre, together with lights, band, door-keepers, scene-shifters, and supernumeraries,—the corps dramatique being provided and the plays selected by the hirer, who had the entire management of the representation and exclusive control over the persons employed. Here, however, the actors and actresses and all who were engaged or assisting in the performance were the paid servants of \*the defendant; and the defendant received a profit upon the performance. The fact of the assignment not being *by deed* is clearly no objection to the plaintiff's right to recover: and the objection that the right of representation could not pass by an assignment after the author had parted with the copyright, has already received an answer. [WILLIAMS, J.—It is by no means clear upon the evidence that Marsh

was not the original proprietor of both the copyright and what has sometimes been called the stage-right.(a)]

ERLE, C. J.—Mr. Chambers has said enough to satisfy me that the rule ought to be made absolute to enter a verdict for the plaintiff for one penalty of 40s., for one representation of the dramatic piece in question without the consent of the proprietor. It seems that the plaintiff employed Stewart to write the piece, furnishing him with the plot and incidents, and that Stewart in consideration of 2*l.* signed a paper whereby he professed to assign to the plaintiff the sole and entire right of performing the piece. I think that instrument of assignment was sufficient to pass the right, if any were in Stewart, to the plaintiff. I think there is nothing in the point urged by Mr. Lush, that the right of representing a dramatic piece can only be assigned by deed. The statute 3 & 4 W. 4, c. 15, contemplates the case of both the author and the assignee being entitled to authorize the representation: and s. 24 of the 5 & 6 Vict. c. 45 contains a proviso "that nothing therein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the 3 & 4 W. 4, c. 15, or of this act, although no entry shall be made in the book of registry aforesaid." I think that proves that the plaintiff might claim as assignee, without \*431] \*showing a title by deed. Then, as to the objection raised to the plaintiff's right to sue because the assignment was not registered, after the case of *Lacy v. Rhys*, 33 Law J. Q. B. 157, I am satisfied that it is not tenable. After that judgment, we must hold that the assignment need not be registered. The principal matter to be discussed and weighed appears to me to be whether the defendant had caused the dramatic piece in question to be represented. It appears that the defendant is the proprietor of the Grecian Theatre, and the employer of the dramatic corps attached thereto; that his son, the stage-manager, hired for his benefit-night the theatre together with the company of actors and servants and lights, for the sum of 30*l.*; and that the son, in the defendant's theatre, and with the aid of his actors and actresses, musicians, servants, lights, and other paraphernalia, represented the dramatic piece in question, in violation of the plaintiff's sole and exclusive right of representing or causing it to be represented. I think the defendant is responsible for that representation. He was the proprietor of the theatre, and had entire control over the establishment and all belonging to it; and what was done by his son was done by his permission. The case of *Lyon v. Knowles* seems to me to recognise that distinction. There, the defendant merely let his theatre, with the scenery, scene-shifters, band, lights, &c., to Dillon, who brought his own company to represent pieces of his own selection, the plaintiff having no control whatever over any person employed in the representation. Here, however, the piece is performed by the defendant's own corps dramatique, his son being one of them; and the performance takes place for the defendant's profit to the extent of 30*l.* I think, therefore, it is impossible to say that the defendant did not cause the piece to be represented.

(a) See *Hutton v. Kean*, 7 C. B. N. S. 268 (E. C. L. R. vol. 97).

\*WILLIAMS, J.—I am of the same opinion. I have nothing to add to what has been said by my Lord, except as to the last [\*432 point. It seems to me that in point of law the representation of this dramatic piece was caused by the defendant. His son acted in the capacity of stage-manager for him; and he, in consideration of 80*l.*, obtained leave from his father to use the theatre for one night as he pleased, with all the dramatic corps, musicians, lights, &c., without any restriction. It seems to me to follow that the defendant authorized all that was done, and consequently is responsible for that violation of the rights of the plaintiff.

Rule absolute accordingly.(a)

*June 8.* The plaintiff having applied to Keating, J., at Chambers, for an order for costs under the statute 18 & 14 Vict. c. 61, upon an affidavit which stated, that, at the time of the commencement of the action, he resided at No. 70, Spring Street, Edgbaston, Birmingham, in the county of Warwick, within the jurisdiction of the Warwickshire county court holden at Birmingham, and still resided there; that the defendant at the time of the commencement of the action resided and carried on business at the Eagle Tavern, City Road, in the county of Middlesex, within the jurisdiction of the Clerkenwell county court of Middlesex holden at Islington: and that his aforesaid place of business was distant from the place of residence and business of the defendant more than twenty miles, to wit one \*hundred [\*433 miles and upwards,—his application was opposed upon affidavits alleging that the plaintiff recovered only 40*s.* damages, and that at the time of the commencement of the action the plaintiff resided with his family at North Woolwich, in the county of Essex; whereupon the learned judge refused to make an order.

*Montagu Chambers, Q. C.*, now moved for a rule under the 15 & 16 Vict. c. 54, s. 4, which enacts that, "in any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th section of the 13 & 14 Vict. c. 61, whether there be a verdict in such action or not, if the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at Chambers, upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 128th section of the 9 & 10 Vict. c. 95,—or for which no plaint could have been entered in any such county courts, or that such action was removed from a county court by certiorari, or that there was sufficient reason for bringing such action in the court in which such action was brought,—then and in any of such cases the court in which such action is brought, or the said judge at Chambers, shall thereupon by rule or order direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if the before-mentioned act of the 13 & 14 Vict. c. 61 had not been passed."

The application was supported by affidavits stating, that, though

(a) The Lord Chief Justice and Williams, J., being the only members of the court who had heard the argument of Mr. Lush, the other judges abstained from taking any part in the decision.

actually residing at North Woolwich at the time of the commencement of the action, the plaintiff's residence there was of a temporary \*434] character only, for the purpose of enabling him to fulfil an engagement in his profession of comedian and ballet-master at the North Woolwich Gardens, his *permanent residence* being at that time and still being at Birmingham. In *Macdougall v. Paterson*, 11 C. B. 755 (E. C. L. R. vol. 78), it was held, that, where a man having a *permanent residence* at one place, has a lodging for a *temporary purpose* only at another place, he does not "dwell" at the latter place, within the meaning of the 128th section of the 9 & 10 Vict. c. 95, so as to oust the jurisdiction of the superior courts. So, in *Gorslett v. Harris*, 29 Law Times 75, upon an application to deprive the plaintiff of costs, it appearing that the defendant was a builder who had been employed to fit up certain houses in the county court district where a material part of the cause of action arose, and that for the purpose of enabling him to perform that contract he had set up workshops and counting-houses there,—it was held, nevertheless, that, as the works there were only set up for the purpose of the particular job, and his permanent residence was elsewhere, he did not carry on his business there within the meaning of the 9 & 10 Vict. c. 95. [BYLES, J.—In a more recent case in this court,—*Butler v. Ablewhite*, 6 C. B. N. S. 740 (E. C. L. R. vol. 95),—the same doctrine prevailed, and was carried perhaps a little further. There, the plaintiff had *two permanent places of residence*,—one in London, where the defendant dwelt, and where the cause of action accrued,—the other more than twenty miles from London. At the time of bringing the action, the plaintiff was living with his family at his country residence: and it was held to be a case of concurrent jurisdiction, and that the plaintiff was entitled to costs under the 15 & 16 Vict. c. 54, s. 4.](a)

\*ERLE, C. J.—Let the attorney go back to my Brother \*435] Keating with the new affidavits, and call his attention to the 15 & 16 Vict. c. 54, s. 4.

This was done, and the learned judge made the order as prayed.

(a) And see *Bennett v. Benham*, 15 C. B. N. S. 616 (E. C. L. R. vol. 109), where it was held, that, where one of two plaintiffs resides within and the other without the distance of twenty miles from the defendant, and the sum recovered is under 20*l.* in contract and 5*l.* in tort, the case is one of concurrent jurisdiction within the 128th section of the 9 & 10 Vict. c. 95.

In this country, under the Copyright Act of 1831 and its supplement of 1856, which are substantially the same as the Copyright and Dramatic Copyright Acts of England, and provide that any copyright hereafter granted to the author or proprietor of a dramatic composition designed for public representation, shall be deemed to confer on the said author or proprietor, his heirs and assigns, along with the right to print and publish, the right also to represent the same. It was

held, in an action on the case for the infringement of a copyright in a play, that the copyright and fact of representation being established, the burden is on the defendant to show the author's consent to the representation, and the mere fact of the publication is not permission to perform it.

Drummond, J., in his charge to the jury, saying that the author of a play has the unquestionable right, besides that of publication, to the sole representation of it, and no person can do

either the one or the other without his consent: *Bourcicault v. Wood*, Circuit Court of the United States, reported in 7 Am. Law Reg. 539 [1868].

In *Roberts v. Meyers*, 23 Law Rep. 397, an assignee of the exclusive right

of acting and representing a drama in certain cities of the United States, was held entitled to maintain an action in his own name against a party infringing his right.

### BOVILL v. HADLEY and Others. June 13.

The 43d section of the Patent Law Amendment Act, 15 & 16 Vict. c. 83, enacts that it shall be lawful for the judge before whom an action for infringing letters-patent shall be tried, to certify on the record that the validity of the patent came in question; and that "the record, with such certificate, *being given in evidence in any suit or action for infringing the said letters-patent,*" shall entitle the plaintiff, on obtaining final judgment, to "his full costs, charges, and expenses, taxed as between attorney and client," unless the judge shall certify that he ought not to have such full costs.

An action having been brought by a patentee (substantially) for the recovery of royalties under a due license, a compromise was entered into before the plaintiff's case was closed, and an order of *nisi prius* was drawn up, under which the defendant was to pay an agreed sum, and a verdict was to be entered for the plaintiff in the action, for 40s. damages, and costs, with all "usual certificates."

After the cause was thus disposed of, the presiding judge, upon an *ex parte* application, endorsed on the record a certificate that the record in a certain action wherein Bovill was plaintiff and Keyworth was defendant, and the certificate thereon endorsed, was given in evidence at the trial of this action:—

Held, that this certificate was improperly granted,—the record and certificate in the former action not having been given in evidence,—and it not being under the circumstances a "usual certificate" within the contemplation of the parties.

THIS was an action brought for the infringement by the defendants at their flour-mills in Upper Thames Street of certain letters patent granted to the plaintiff on the 6th of June, 1863, and being a prolongation of letters patent originally granted to the plaintiff on the 5th of June, 1849, for "improvements in the manufacture of wheat into meal and flour," and which last-mentioned letters patent expired on the 5th of June, 1863.

\*The circumstances which gave rise to this action were as follows:—The defendants had formerly carried on business as millers at Gloucester, where they used the plaintiff's patent of 1849 under a license from him. In 1858, the defendants became occupiers of the City Mills, Upper Thames Street, under an assignment of the lease from one Ponsford, the lessee. These mills had been built under the superintendence of the plaintiff, and fitted with machinery upon the principle of his patent; and the defendants continued to use the patent down to January last. Prior to June, 1863, disputes had arisen between the plaintiff and others interested with him in the patent, as to the right to receive the royalties due for the use thereof, and in consequence no royalties were paid for some time: but, ultimately, those disputes were arranged and a sum of money paid by the defendants in satisfaction of all claims down to the 5th of June, 1863, upon which day the patent expired. The new patent having been granted to the plaintiffs solely, negotiations were opened between him and the defendants for the purpose of fixing the royalty and other terms upon which the defendants were for the future to

use the patent; but these negotiations failed in consequence of the plaintiff's requiring the defendants to take an absolute license for the full period (five years) of the extension of the patent. Ultimately this action was brought by the plaintiff to recover damages for the alleged infringement of the plaintiff's patent from June, 1863, down to the commencement of the action. The defendants paid money into court, but the plaintiff declined to accept it. There never was any question raised between the parties as to the validity of the patent; nor was it disputed that the defendants had used the patent,—the only question being as to the amount of royalty payable.

\*437] There was another action standing for trial \*between the same parties at the same Assizes (Surrey Spring Assizes, 1864), and in that action the validity of the patent *was* in question.

After the trial of this cause had proceeded some way, a compromise of both actions was made upon terms embodied in an order of nisi prius, and a verdict was by agreement entered in each action, for 40*s.* and costs, *with all usual certificates.*

The validity of the plaintiff's letters patent of 1849 was in question in a cause of *Bovill v. Keyworth*, where the plaintiff had a verdict, and the judge who tried that cause (Lord Campbell) certified on the record, under the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83, s. 43), that the validity of the letters patent in the declaration mentioned came in question.

After the verdict had been entered in pursuance of the terms of the compromise, Erle, C. J., upon having Lord Campbell's certificate endorsed upon the record in *Bovill v. Keyworth* produced to him, endorsed and signed on the record in this action a certificate in the form given in *Scott's Costs*, 2d edit., p. 823, No. 6, that the record in *Bovill v. Keyworth* and the said certificate had been given in evidence upon the trial of this action.

This certificate being produced before the Master, he was proceeding to tax the plaintiff's costs "as between attorney and client;" whereupon

*Watkin Williams*, for the defendants, on a former day in this term, obtained a rule nisi in the following form,—“Upon reading the record of nisi prius between the said parties, and the certificate of the Lord Chief Justice endorsed thereon, to the effect that the record in *Bovill v. Keyworth* had been given in evidence in this cause, it is ordered that the plaintiff show cause, &c., why the said certificate should not \*438] be set aside, and a certificate be endorsed \*on the said record, if necessary, to deprive the plaintiff of full costs in this cause as between attorney and client, on the grounds that the said record in *Bovill v. Keyworth* was not in fact given in evidence in this cause, and that such first-mentioned certificate is not a ‘usual certificate’ within the meaning of the terms agreed upon between the parties at the trial of this cause.”

*Bovill*, Q. C., *Garth*, and *Matthew*, now showed cause.—The certificate in question was a “usual certificate” within the terms of the compromise, and was authorized by the 43d section of the statute 15 & 16 Vict. c. 83, which enacts, that, “in taxing the costs in any action in any of Her Majesty's superior courts, &c., commenced after the passing of this act, for infringing letters patent, regard shall be had

to the particulars delivered in such action, and the plaintiff and defendant respectively shall not be allowed any costs in respect of any particular unless certified by the judge before whom the trial was had to have been proved by such plaintiff or defendant respectively, without regard to the general costs of the cause; and it shall be lawful for the judge before whom any such action shall be tried to certify on the record that the validity of the letters patent in the declaration mentioned came in question; (a) and the record, with such certificate, *being given in evidence* in any suit or action for infringing the said letters patent, or in any proceeding by scire facias to repeal the letters patent, shall entitle the plaintiff in any such suit or action, or the defendant in such proceeding by scire facias, on obtaining a decree, decretal order, or final judgment, to his full costs, charges, and expenses, taxed as between attorney and client." (b) It was held so long ago as \*the case of *Newhall v. Wilkins*, 17 Law Times 20, that, to entitle a plaintiff who has recovered a verdict in an [\*439 action for the infringement of a patent, to treble costs under the 5 & 6 W. 4, c. 83, s. 3, the proper course (in order to avoid prejudice to the defendant) is, to produce such record after the verdict has been pronounced. [WILLES, J.—It is merely to affect the amount of costs. It is an absolute right; but it would seem that there must be an order of the court or a judge.] The reason for the provision is obvious: many expenses, such as experiments by scientific men, and the like, are necessary in patent causes, which are not usually allowed as costs between party and party. [WILLIAMS, J.—The statute intends that there shall be some control over the plaintiff: the judge is to exercise that.] It may be that the plaintiff's right to full costs cannot come into operation unless the cause is tried: but that is a question which does not arise here. In *Forman v. Dawes*, 11 M. & W. 730, by a court of requests act (48 G. 3, c. cx., s. 52, Wolverhampton), it was enacted that no action should be brought for any matter done in pursuance of the act until a month's notice of action should be given, &c., and if in such action it should appear to be so done, the jury should find for the defendant, and, upon such verdict, or, if the plaintiff should become nonsuited, "or if upon a verdict or demurrer judgment should be given against the plaintiff, the defendant should recover treble costs." The defendant obtained a verdict without having given any evidence,—the plaintiff having failed to establish any case: and it was held that the defendant was entitled \*to treble costs, with- [\*440 out entering a suggestion on the roll, or having given the act of parliament in evidence at the trial. Rolfe, B., in delivering judgment, says: "With regard to the first point, that the defendant had given no evidence, and therefore that he was not entitled to the costs, I apprehend that is not required. The defendant is not obliged to give evidence, to entitle himself to costs. That impression may have arisen from an expression found in this act of parliament and in many

(a) In the event of the *plaintiff* obtaining a verdict?

(b) This is an alteration from the former enactment of 5 & 6 W. 4, c. 83, s. 3, which gave the plaintiff under similar circumstances "treble costs,"—not treble costs in the ordinary sense, viz., taxed costs, adding a half and a quarter thereto (*Stainland v. Ludlam*, 4 B. & C. 889 (Ex. C. L. R. vol. 10), 7 D. & R. 484), but costs "to be taxed at three times the taxed costs."

Double and treble costs abolished by 5 & 6 Vict. c. 97.



others,—an unhappy expression,—that a party ‘may give this act and the special matter in evidence:’ but that means, I apprehend, that the party may plead the general issue, and, without a reference to the general rules of pleading, give the special matter of defence in evidence; but it does not mean that he is to give evidence if nothing calls for an answer from him. And it is conclusive that such is its meaning, that the defendant is equally to have treble costs if the plaintiff be *nonsuited*.” It is clear, therefore, that it is not necessary to go through the ceremony of proving at the trial that which is to affect something arising after the trial, viz., the taxation of costs.

*Lush, Q. C., and Watkin Williams*, in support of the rule.—As between the parties to this action, there never had been any question as to the validity of the patents or either of them. The plaintiff’s apparatus had been put up by the patentee for Ponsford; and, when the defendants took an assignment of Ponsford’s lease and all the machinery on the premises, they were obliged to continue the use of the patent, for they could not remove it without incurring great expense. They had before used it at their mills at Gloucester, under a license: and they paid all royalties due, as Ponsford had done, down to the expiration of the patent in 1868. As licensees, they were estopped \*441] from disputing the validity of the patent,—the extended as well as the original patent. [WILLIAMS, J.—So held in the House of Lords, in *Crossley v. Dixon*, 8 Law T. N. S. 260.] The provision in the Patent Act has no reference to a case of this description. The 3d section of the 5 & 6 W. 4, c. 83, gave the plaintiff treble costs, where the certificate was given in evidence “in any other suit or action whatever touching such patent,”—words which would have embraced an action for royalties. The recent act restrains it to the case of the certificate being given in evidence in any suit or action *for infringing the said letters patent*,” &c.] That obviously means, where the patentee has to defend the validity of his patent a second time. [BYLES, J.—You contend that this cannot be a “usual certificate,” because the statute requires none?] Just so. What was meant was a certificate to entitle the plaintiff to costs of particulars and to the costs of a special jury. Neither was this matter for a suggestion: *Finlay v. Seaton*, 1 Taunt. 210.(a) Assuming, however, that the statute does apply to a case like this,—to entitle the plaintiff to full costs, it is necessary that the record and certificate should be “given in evidence in the action.” The judge is to exercise a discretion whether under all the circumstances the plaintiff should have costs or not. Unless the certificate is brought to the notice of the judge at the trial, the defendant cannot be heard. In *Newhall v. Wilkins*, 17 Law T. 20, the record and certificate were brought to the notice of Lord Campbell immediately after the verdict was pronounced. Here, the certificate was given upon an *ex parte* application. It must be \*442] produced at some period during the trial. It may be \*like the record of a conviction of a prisoner. It is submitted, therefore, that this case is not within the statute at all,—that this certificate is not a “usual certificate” within the contemplation of the parties,—and that the plaintiff has not performed the condition upon which

(a) See *Newnham v. Bever*, 8 C. B. 560 (E. C. L. R. vol. 65), and *Maberly v. Titterton*, 7 M. & W. 540.

alone full costs are given. Besides, the compromise was entered into before the defendants' case was begun. That must have been founded upon the then existing materials: whereas, a step taken afterwards opens up a totally different state of things.

ERLE, C. J.—The cause having been stopped by a compromise, with a stipulation that all usual certificates should be given, that must mean all usual certificates *rebus sic stantibus*. No certificate under the 15 & 16 Vict. c. 83, s. 43, could be necessary unless the record and certificate in the former action had been given in evidence. When the compromise was made, nothing more could be done; consequently, the certificate under the Patent Law Amendment Act could not have been within the contemplation of the parties. The rule for setting aside my certificate must therefore be made absolute, and, if necessary, a certificate endorsed upon the record that the plaintiff ought not to have "full costs."

WILLIAMS, J.—I am of the same opinion. The court has simply to determine whether the plaintiff should have full costs or not. I think it was not in the contemplation of the parties at the time the compromise was entered into that he should have them.

WILLES, J.—The compromise put an end to the case. The plaintiff could not have full costs under the 43d \*section of the 15 & 16 Vict. c. 83, without putting the record and certificate in [448 the former action in evidence.

BYLES, J., concurred.

Rule absolute.

### MAUGHAM v. SHARPE and Another. *June 1.*

1. A., in consideration of an advance of 650*l.* made to him by B. and C., who carried on business under the name of "The City Investment and Advance Company," by deed in the form of a mortgage assigned to them all the goods, chattels, and effects upon his farm and premises, to secure the repayment of the advance, with power to the mortgagees, on default, to sell at their discretion and to pay over the surplus to A. B. and C. took possession under this deed (which was not registered under the Bills of Sale Act), and sold the goods by auction.

D. after B. and C. had taken possession entered under a subsequent bill of sale (duly registered), and paid out a claim of the landlord for rent:—

Held, that B. and C. having perfected their title by taking possession under their mortgage, had a right to sell; and that they were not responsible to D. for any default in the mode of conducting the sale.

2. Held also, that D. could not recover against B. and C. the sum paid by him to the landlord, as money paid to their use.

3. Held also, that the conveyance of the goods to "The City Investment and Advance Company," enured as a conveyance to B. and C., so soon as it was ascertained that they were the persons who carried on business under that name.

THIS was an action substantially for misconducting a sale of goods. <sup>1</sup>

The first count was for the conversion of certain goods and chattels, and the second for money received by the defendants to the plaintiff's use.

The third count stated, that, by indenture bearing date the 2d of February, 1864, made between one William Dolby of the one part, and the plaintiff of the other part, and duly registered under the Bills of Sale Act (17 & 18 Vict. c. 36), the said William Dolby did grant, bargain, sell, and assign to the plaintiff all the goods, farming-stock,

growing crops, agricultural implements, live and dead stock, and every other article which then were in or about a certain farm called the Horse Grove, at Rotherfield, and more fully set forth in the \*444] schedule to the said indenture, for the purpose \*of securing to the plaintiff the repayment of the sum of 650*l.* then advanced by him to the said William Dolby, which said sum was at the time of the committing of the grievances thereafter mentioned, and still remained, due and unpaid,—of all which the defendants had notice: that the defendants claimed to have a charge or lien upon the said goods, chattels, and effects, as a security for an alleged debt due to them from the said William Dolby, and to have a power to sell the said goods, chattels, and effects to satisfy their said debt: and that thereupon, and whilst the said indenture continued in full force and effect, and the said sum of 650*l.* so advanced as aforesaid remained due and unpaid, the defendants proceeded to sell and dispose of the said goods, chattels, and effects granted and assigned to the plaintiff as aforesaid, on pretence of satisfying the said alleged debt due to them from the said William Dolby as aforesaid; and that thereupon it became and was the duty of the defendants to use all reasonable care and diligence in and about selling and disposing of the said goods, chattels, and effects, and in and about preventing a sale thereof at an under-value: Breach, that the defendants did not use reasonable or any care or diligence in and about selling and disposing of the said goods and effects, or in and about preventing a sale thereof at an under-value, but so carelessly and negligently conducted themselves in the premises that the said goods, chattels, and effects were sold at an under-value, and for prices grossly insufficient and inadequate, and not more than sufficient to satisfy the defendants' said debt, although the defendants ought to and might have obtained for the same a much larger sum, and sufficient not only to satisfy the said alleged debt, but also to leave a large balance towards the satisfaction of the sum \*445] of 650*l.* so due and owing to the plaintiff as aforesaid; whereby and by reason of the premises the plaintiff was altogether deprived of the benefit of his said security and of the said indenture.

To this count the defendants pleaded,—fourthly, a traverse of the assignment of the goods by William Dolby to the plaintiff,—fifthly, that, before and at the time of the making of the said indenture, and thence until and at the time of the alleged sale and disposal of the said goods, farming-stock, growing crops, agricultural implements, live and dead stock, and other articles, the same respectively were the goods of and belonging to the defendants, and at the time of the said indenture the same were not, nor were any of them, the goods of, nor did they or any of them belong to, the said William Dolby, nor had the said William Dolby at that time the power to grant, bargain, sell, or assign the same, or any of them, and that the defendants sold and disposed of the same as in the third count mentioned, in their own right. Issue thereon.

The cause was tried before Erle, C. J., at the last Spring Assizes for the county of Surrey. The facts which appeared in evidence were as follows:—On the 10th of December, 1863, Dolby, who occupied a farm at Rotherfield, in the county of Sussex, obtained an advance of

400*l.* from the defendants, who carried on business in London under the name of The City Investment and Advance Company, upon the security of an assignment of all his farming-stock and effects, which was in the following form:—

“This indenture made the 10th day of December, 1863, between William Dolby, of Horse Grove, Rotherfield, in the county of Sussex, farmer, hereinafter called the mortgagor, of the one part, and The City Investment and Advance Company, of No. 25, Cannon Street, in the city of London, hereinafter called the mortgagees, of the other part: Whereas, the said \*mortgagor, being desirous of borrowing [\*446 the sum of 400*l.*, hath applied to the said mortgagees to lend him the same, which they have agreed to do upon having such security as hath already or may hereafter be given by guarantee or otherwise: And whereas the said mortgagees, in pursuance of this agreement, have this day lent to the said mortgagor the said sum of 400*l.*, which is hereafter called ‘the said loan,’ the receipt whereof the said mortgagor doth hereby admit and acknowledge: Now this indenture witnesseth, that, in consideration of the said loan, he the said mortgagor hath bargained, sold, assigned, and transferred, and by these presents doth bargain, sell, assign, and transfer unto the said mortgagees, their executors, administrators, and assigns, all and singular the household furniture, books, plate, linen, live-stock, implements, crops, goods, chattels, effects, and things of him the said mortgagor, now being in or upon the house, premises, and lands situate at Horse Grove, Rotherfield, aforesaid, now occupied by him the said mortgagor, and also all other goods, chattels, and effects of the said mortgagor in and about the aforesaid house and premises, or which may hereafter come into or upon any part of the aforesaid house and premises, either in substitution or otherwise, during the time any money may be due from the said mortgagor, his executors, administrators, or assigns, under or by virtue of these presents, To have and to hold the said goods, fixtures, and effects hereby assigned or intended so to be, unto the said mortgagees, their executors, administrators, and assigns, as their own proper goods, chattels, fixtures, and effects: Provided that, in case the said mortgagor, his executors, administrators, or assigns, shall pay the sum of 50*l.* on the 10th of January, 1864, 100*l.* on the 10th of February, 1864, 100*l.* on the 10th of March, 1864, 100*l.* on the 10th of April, 1864, and 50*l.* on the 10th \*of May, 1864 next, or on such further or extended day or days to be [\*447 agreed on by the said mortgagees at the request of the said mortgagor, or earlier than either such days if by the said mortgagees, their executors, administrators, or assigns, demanded,—then these presents and every part thereof shall cease, determine, and be void, except as to the rights and remedies of the said mortgagees for any breaches already then committed. But it is hereby agreed and declared that the day first named for payment is not to be extended or altered unless the said mortgagees shall think fit, and notwithstanding the request of such mortgagor. And the said mortgagor doth hereby for himself, his heirs, executors, and administrators, covenant with the said mortgagees, their executors, administrators, and assigns, that he, the said mortgagor, his heirs, executors, or administrators, will on the

aforesaid days of payment, or on such further or other day or days as aforesaid, or before either of such days, if required so to do by the said mortgagees, their executors, administrators, or assigns, pay to them the said mortgagees, their executors, administrators, or assigns, the said loan without any deduction or abatement from or out of the same. And it is hereby declared and agreed between the said parties hereto, subject to, but nevertheless without prejudice to the several clauses, provisos, and agreements herein contained, that it shall and may be lawful for the said mortgagees, their executors, administrators, or assigns, or other the person or persons for the time being entitled to possession of the said goods, fixtures, and effects, to give to the said mortgagor, as often as they shall think fit, such further or other time or times beyond the aforesaid day or days appointed for the repayment of the said loan; and also that it shall and may be lawful, notwithstanding the proviso for redemption, for the said mortgagees or \*448] other the person or persons for the time being entitled to the possession of the said goods, fixtures, and effects, immediately to take, have, and retain possession of the said goods, fixtures, and effects, until all money, costs, charges, and expenses hereby secured shall have been fully paid and satisfied: but it is also hereby declared and agreed to be lawful for the said mortgagees at any time during the continuance of this security, if they shall think fit, to relinquish possession of such goods, fixtures, and effects, and again to retake and retain possession thereof, as often and whenever they shall think fit, without this security being invalidated or rendered void or voidable. And it is hereby further agreed and declared, in case default shall be made in payment by the said mortgagor, his executors, administrators, or assigns, of the said loan or any part thereof, contrary to the covenant for payment thereof hereinbefore contained, then and in such case it shall be lawful for the said mortgagees, their executors, administrators, or assigns, either immediately or whenever they shall think fit, to sell and dispose of the said goods, fixtures, live-stock, implements, crops, and effects, and every part thereof, on or at the said hereinbefore-mentioned house or premises where the said goods, fixtures, and effects now are, or to remove the said goods, fixtures, and effects, and sell the same whenever and wheresoever they shall think proper, either by private contract or public auction, together or in parcels, for such price or prices as can be reasonably had or gotten for the same, or to have the said goods, fixtures, and effects valued by a competent person, and to purchase them at such valuation, or to let them for hire (and to receive and take the moneys to arise from such letting to hire), and thereout in the first place to retain to and reimburse and pay themselves the said loan or so much thereof as shall then \*449] remain due, together with all costs of sale, valuation fee, and other charges and expenses which may have been incurred, and all expenses, damages, law charges, and payments that may have been incurred or made by them in and about the defending, supporting, and upholding their claim and mortgage on the said goods, fixtures, and effects, and incident or in relation thereto, and giving effect to these presents according to the true intent and meaning thereof, and in and about making any such sale or sales, and also in and about the receipt and recovery of the said loan, and in the next place, or in

the first place if he(a) shall think fit, to pay all rent, rates, taxes, and encumbrances that may be due in respect of the messuage, tenement, and premises where the said goods, fixtures, and effects shall be, and which shall or may affect or attach to the said goods, fixtures, and effects; and from and after the full payment of the said loan, and all commissions, valuations, costs, charges, damages, expenses, payments, rents, taxes, and encumbrances as are herein mentioned, to render to and account for the surplus (if any) of the money arising from such sale or sales aforesaid unto the said mortgagor, his executors, administrators, or assigns. And the receipt or receipts of the said mortgagees shall be a sufficient discharge to all and every purchaser or purchasers, who shall not be required to see to the application thereof by the said mortgagees, their executors, administrators, or assigns. And it is hereby further declared and agreed that the said mortgagees may, if they think fit, pay any rent or taxes which shall or may at any time be due or payable in respect of any house or premises where the said goods, fixtures, and effects, or any of them, shall be put or placed while any money shall be due on this security, and to add the same to this security as a charge upon the said goods, fixtures, and \*effects; and, in the event of the sale of the said goods, [\*450 chattels, fixtures, and effects not taking place, that the said mortgagees, their executors, administrators, or assigns, shall not be obliged or compelled or compellable to accept the said loan, or so much thereof as shall then remain due, and interest as aforesaid, without being paid all commission, valuation fees, costs, charges, damages, expenses, and payments of any kind which they may have been put to or incurred or sustained or be liable to have made with reference or in relation to these presents. And, in the event of payment of the said last-mentioned commission, valuation [fees], costs, charges, damages, expenses, and payments not being made to the said mortgagees, their executors, administrators, or assigns, or in the event of the said mortgagor permitting himself to be sued in any of Her Majesty's courts of law or equity for any debt or debts justly due and owing, or if any writ of fieri facias, distresses for rent or taxes, or any other proceedings of any nature, be levied or taken against the said goods, fixtures, and effects hereby assigned or expressed or intended so to be, or in the event of the said mortgagor not producing to the said mortgagees, their executors, administrators, or assigns, when demanded by them or either of them, the receipt or receipts for the rent or taxes payable by him the said mortgagor in respect of the said house or houses or premises where the said goods, fixtures, and effects shall be or be placed, for the quarter immediately preceding the day when the receipt or receipts shall be so demanded, or in the event of the said mortgagor or any other person doing or committing, or neglecting or refusing to get done, any act, matter, or thing whereby the said mortgagees, their executors, administrators, or assigns, or the security given by these presents to them the said mortgagees, their executors, administrators, or \*assigns, is, shall, or may in any [\*451 manner be prejudiced or damnified,—then and in either such events it shall and may be lawful for the said mortgagees, their executors, administrators, or assigns, or their agent or agents, forthwith

(a) Sic.

to enter the said house and premises, and to sell and dispose of the said goods, fixtures, and effects, notwithstanding the time for payment by the said mortgagor as aforesaid of the said loan shall not have arrived, and to deal with the said goods, fixtures, and effects, and apply the proceeds arising from the sale thereof as they might have done if the time for payment of the said loan according to the said covenant in that behalf hereinbefore contained had elapsed and expired, and the said mortgagor had made default in payment thereof. And the said mortgagor [doth] hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said mortgagees, their executors, administrators, and assigns, that, in the event of the said mortgagees putting or placing any person in and upon the said house and premises Horse Grove, Rotherfield aforesaid, for the purpose of taking and keeping possession of the said goods, fixtures, and effects, that the said mortgagor will daily and every day pay all expenses of and incident to such possession; and that, in the event of default in payment by the said mortgagor of the said expenses, the said mortgagees shall be at liberty to pay the same and to demand immediate repayment thereof, and, in default of such repayment shall be at liberty to deal with the said goods, fixtures, and effects, in like manner as if default had been made in the payment of the said loan, contrary to the covenant for the payment thereof hereinbefore contained."

The deed also contained covenants by the mortgagor not to remove the goods, for title, and other covenants not material to the question now before the court.

\*452] \*The lease of the farm and also a promissory note for 400*l.* were deposited as collateral security: but the mortgage was not registered under the statute 17 & 18 Vict. c. 36.

Default having been made by Dolby in payment of the first instalment, the defendants (the mortgagees) on the 3d of February, 1864, took possession of all the goods upon the premises. Whilst they continued in possession, the landlord distrained for 350*l.* rent due at Michaelmas, 1863, and (Dolby having left the farm) proceeded to advertise a sale of the effects for the 12th of February, 1864.

On the 2d of February, 1864, Dolby had procured a loan of 650*l.* from the plaintiff, for which he gave him a bill of sale on the property already assigned to the defendants by the deed of December 10th, 1863. This last-mentioned bill of sale was duly registered under the statute on the 8th of February; and on the same day one Roberts on his behalf claimed to take possession, but was prevented by the defendants. The plaintiff then attempted to get an assignment of the goods from the landlord, whose claim (amounting with the auctioneer's charges to 382*l.*) he paid on the 11th. On the same day the sheriff entered with an execution for 160*l.*

In this state of things, the defendants, being apprehensive of a bankruptcy, availing themselves of the advertisements issued by the landlord, procured another auctioneer to proceed with the sale, and the goods were accordingly sold on the 12th and 13th of February. The sale, after paying 167*l.* 15*s.* 6*d.* into court to abide the event of an interpleader issue with the sheriff, and 47*l.* 8*s.* 4*d.* for the expenses, realized 406*l.* 16*s.* 2*d.*

On the part of the plaintiff, witnesses were called who valued the property on the premises at the time \*of the sale, one at 1000*l.*, [\*453 another at 1200*l.*; and it was also proved that two persons attending the sale had been bribed by the landlord not to bid against him, but it was not shown that the defendants were cognisant of that fact.

It was then submitted on the part of the plaintiff,—first, that the bill of sale of the 10th of December, 1863, professing to be a conveyance to the City Investment and Advance Company, passed no property in the goods to Sharpe and Baker, the defendants, and consequently the fifth plea was not sustained,—secondly, that the defendants' bill of sale being void as against the sheriff and all having a better title than the sheriff, the plaintiff's registered bill of sale was entitled to priority,—thirdly, that he was entitled to recover damages against the defendants for not having conducted the sale in a reasonably proper manner,—and, fourthly, that he was entitled under the count for money paid to recover against the defendants the 382*l.* paid by him to get rid of the landlord's distress.

His lordship overruled the last suggestion, but reserved the plaintiff leave to move on the other points if in the result it should be necessary: and he left it to the jury to say whether or not the sale had been properly conducted.

The jury returned a verdict for the plaintiff for 582*l.*, being 382*l.* for the amount paid to the landlord, and 200*l.* for having been wrongfully deprived of the fruits of his bill of sale.

*Lush*, Q. C., in pursuance of leave reserved to him, in Easter Term last obtained a rule calling upon the plaintiff to show cause why the verdict entered for him should not be set aside, and a verdict entered for the defendants on all the pleas except the seventh, or a nonsuit, on the ground that those pleas were \*established by the evidence; [\*454 or for a new trial, on the ground that the verdict was against the weight of evidence, and the damages excessive.

*Joyce*, for the plaintiff, also moved on the points reserved to him at the trial; and the court ordered the following addition to be made to the defendants' rule,—“And it is further ordered, that, in the event of this rule being made absolute, the plaintiff is to be at liberty to argue the points that were reserved to him on the trial,—a copy of which he is to deliver to the defendants or their attorney.”

*Hawkins*, Q. C., *Joyce*, and *Morgan Lloyd*, now showed cause.—The sale clearly was not conducted in a reasonable manner, so as to obtain the best prices for the goods. [ERLE, C. J.—Assuming that the plaintiff has a ground of action against the defendants, I am not prepared to say that I was dissatisfied with the verdict. Your great difficulty is this,—Is there any duty imposed by law upon the holders of the first bill of sale towards the holder of the second, so as to give the latter a cause of action against the former for selling the goods at a sacrifice?] It must be conceded that the defendants had a right to sell under their bill of sale. They were, however, aware of the plaintiff's claim under the second bill of sale; and they were also aware of the distress having been put in by the landlord, and of the plaintiff's having paid out the landlord. The payment of that rent was one of the obligations which the defendants took upon themselves



when they took possession of the goods under their deed. There is a manifest distinction between a mortgage of land and a mortgage of chattels: the latter amounts to no more than a pledge. "The mortgagee hath an absolute interest in the land, but the other \*455] hath but a special property in the goods, to detain them for his security:" 5 H. 7, pl. 1; 9 E. 4, pl. 25; 36 E. 3, Bar 188." *Ratcliff v. Davies*, Cro. Jac. 244. In *Franklin v. Neate*, 13 M. & W. 481, it was held that the pawnor of a chattel still retains his property in it (though qualified by the right existing in the pawnee), which he has a right to sell, and by the sale to transfer that property to the buyer; and that, if the pawnee, on the buyer's tendering him the amount due, refuses to deliver it up, the buyer may maintain trover for it. If the defendants' bill of sale gave them a right to the goods only as a security for their advance, the law would impose upon them a duty to take due care of them, and, if they exercised their power of sale, to get the best price they reasonably could obtain for them. If this had been a mortgage of land, there would have been a right to sue left in the grantor. By this instrument a conditional reversion is left in him. [WILLIAMS, J.—It is an absolute conveyance, with a proviso by way of defeasance. The deed is drawn with the utmost ingenuity, to give the mortgagees every conceivable advantage.] There is much confusion in the cases as regards the distinction between mortgages of realty and pawns of chattels. In *Flory v. Denny*, 7 Exch. 581, it was held that a mortgage of a personal chattel may be made without deed. That shows that "mortgage" is only another word for "pledge." There may be a pledge without actual possession: *Reeves v. Capper*, 5 N. C. 186 (E. C. L. R. vol. 35), 6 Scott 877. The cases of *The Lancashire Wagon Company v. Fitzhugh*, 6 Hurlst. & N. 502, and *Mears v. The London and South Western Railway Company*, 11 C. B. N. S. 850 (E. C. L. R. vol. 103), also show that the grantor retained such an interest in these goods as to enable him to maintain an action for a conversion thereof or injury thereto. The same principle is recognised in *Johnson v. Stear*, 15 C. B. N. S. 330 (E. C. L. R. vol. 109), and *Pigot v. Cubley*, 15 C. B. N. S. 701.

\*456] "Then, the bill of sale was not made to the defendants, Sharpe and Baker, but to The City Investment and Advance Company, and therefore conveyed no property in the goods to the defendants. [ERLE, C. J.—They were the only persons interested in the so-called Company. It was merely the style of the firm.] The parties must be truly described: Com. Dig. *Fait* (E. 3); Bac. Abr. *Grants* (C); Co. Litt. 3 a; Sheppard's *Touchstone* 236; *Williams v. Bryant*, 5 M. & W. 447. [WILLES, J.—This must be taken to be the description of a corporation. To assume falsely to be a corporation is an offence against the prerogative of the Crown. ERLE, C. J.—Dolby grants his goods to a corporation. Can a private individual come forward and say that means me?] Even if these persons had a right to use the name of a corporation, there was no evidence that they were known as such. If the defendants could take by such a description, it must be one by which they could sue. Is there any pretence for saying that these defendants could have sued as The City Investment and Advance Company?

The whole of the goods had been seized by the sheriff under the

fi. fa. The defendants' bill of sale, not having been registered under the 17 & 18 Vict. c. 86, was void as against the sheriff's claim. They availed themselves of the plaintiff's bill of sale (which was duly registered) in order to get rid of that execution; and now they turn round and say that as between them and the plaintiff their bill of sale is good. [WILLIAMS, J.—As between two persons claiming under bills of sale, registration nil operatur.] No doubt that is so. But, as between the defendant and the sheriff and all having better title than the sheriff, the defendants' bill of sale was void: *Edwards v. English*, 7 Ellis & B. 564 (E. C. L. R. vol. 90). [ERLE, C. J.—The grievance to the plaintiff is, that the defendants paid the sheriff out of goods which *as against him* the \*sheriff had no right to seize. *Garth* [\*457 intimated that the sheriff had abandoned his claim under the interpleader summons, and that the defendants had at Chambers assented to that money being paid over to the plaintiff.]

Then, the payment of the rent was a payment made under a mistake. [ERLE, C. J.—Not a mistake in point of fact, but of law.] The money was paid by the plaintiff's agent, in ignorance of there being a genuine bill of sale on the property. [ERLE, C. J.—The agent paid the money under the notion that if he paid the condemnation-money the property in the goods would pass to the plaintiff. He certainly knew of the defendants' bill of sale.]

*Garth* (with whom was *Lush*, Q. C.), in support of the rule.—It is said that these defendants cannot take under this deed by the description of The City Investment and Advance Company. [ERLE, C. J.—Individuals may trade under a firm, but cannot assume to be a corporation.] What is assuming a corporate name? [WILLES, J.—That is answered by the case of *Cooch v. Goodman*, 2 Q. B. 580 (E. C. L. R. vol. 42). The court will take judicial notice of what is a corporation.] There is nothing on the face of the deed to show that The City Investment and Advance Company is a corporation, any more than the *Agra and Masterman Bank* is. It has been insisted that this deed, which is in the ordinary form of a mortgage of chattels, is nothing more than a pledge or pawn. The distinction between a mortgage and a pawn is well pointed out in the notes to *Coggs v. Bernard*,<sup>(a)</sup> in *Smith's Leading Cases*, 5th edit. 194, where the learned editors, treating of Vadium or pawn, and referring to a series of authorities defining the relative rights and duties of the pawnor and the \*pawnee, observe,—“From all this it will be seen that a pawn [\*458 differs, on the one hand from a *lien*, which conveys no right to sell whatever, but only a right to retain until the debt in respect of which the lien was created has been satisfied; (b) and, on the other hand, from a *mortgage*, which conveys the entire property of the thing mortgaged to the mortgagee conditionally, so that, when the condition is broken, the property remains absolutely in the mortgagee; whereas, a *pawn* never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawnor is, not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus, which power if he neglect to

(a) 2 Ld. Raym. 909, Com. 133, 1 Salk. 26, 3 Salk. 11, Holt 13 (E. C. L. R. vol. 3).

(b) See *The Thames Ironworks Company v. The Patent Derrick Company*, 1 Johns & H. 93.

use, the general property of the thing pawned continues in the pawnor, who has a right at any time to redeem it.”(a) At p. 196, it is said: “A mere pledge of chattels personal is therefore not, properly speaking, a mortgage, and, though in writing, need not bear a mortgage stamp: *Harris v. Birch*, 9 M. & W. 591. There *may*, however, be a mortgage, properly speaking, of chattels, which will be subject to the same incidents as any other mortgage. A mortgage of a personal chattel may be made without deed: *Flory v. Denny*, 7 Exch. 581.” In *Ryall v. Rowles*, 1 Ves. 348, 1 Atk. 165 (commented upon in 2 White & Tudor’s Leading Cases, 2d edit. 615), Burnett, J., says: “It was contended that pawns, by the Roman and English law, required \*459] delivery, but that hypothecation \*or mortgage did not. As to the Roman law, there was an authority cited, Just. Inst. lib. 4, tit. 6, s. 7, which passage, if it stood alone, might go a good way to prove what it was cited for. But there is another Roman authority proving pignus to be as valid without delivery; and the true distinction between them is only that pignus is of movables capable of delivery, the other of immovables only: Domat. lib. 1; Wood, lib. 3, ch. 2, 219; Digest 50, tit. 16, Law 238; 13 lib. Pandects, tit. 7, Law 1; 20 lib. Pandects, tit. 4, Law 12, s. 10; where a pawn to two and delivered but to one, and where the pledge is concurrent in point of time, the preference to the person to whom a delivery is stated there, that he will have a better remedy by way of action than the other. Delivery, then, is not necessary by the Roman law; and other nations receiving this Roman law corrected the inconvenience of this law as to that point, that, if a pawn is not delivered, it shall not affect a purchaser for valuable consideration, as it certainly did in that law. But supposing that distinction true, it could have no influence in the present case, unless the Roman hypothecation and English mortgage were the same, which they are not. No property was transferred in the hypothecation: *an English mortgage is an immediate conveyance, with power to redeem*; and equity at any time admits redemption, notwithstanding forfeiture: but that does not alter the conveyance, therefore there is no comparison between them; and in the Roman law there is a place where it is held, that, suppose there is an hypothecation, with condition, that, if the money is not paid at the day, the pawnee shall enjoy the goods, that is a conditional sale: Just. Code, lib. 4, tit. 54, Law 2, and the same liber of the Code, relating to conditional sales of movables, Law 7. All that \*460] can be inferred from the Roman law with respect to \*pawns and hypothecation will be foreign, and from the English law as to pawns as foreign. I admit delivery necessary to a pawn: the Year Book cited, 5 H. 7, fo. 1, is an express authority in point, and therewith agrees 2 Roll. Rep. 439, *Ross v. Bramsted*, that is no pawn where no possession is transferred at the time. 2 Leon. 30,(b) and Yelv. 164,(c) are cases not of pawns, but bailment to third persons to sell goods for the use of a particular creditor, who will have an interest in the performance of that contract, and may sue the bailee, which

(a) Com. Dig. *Mortgage* (B.); *Walter v. Smith*, 5 B. & Ald. 439 (E. C. L. R. vol. 7), 1 D. & R. 1; *Kemp v. Westbrook*, 1 Ves. 278; *Demandray v. Metcalfe*, Pre. Ch. 420, 2 Vern. 691; *Vanderzee v. Willis*, 3 Bro. 21; *Ratcliffe v. Davies*, Yelv. 178, Cro. Jac. 244, Noy 137, 1 Bulstr. 29.

(b) *Clark’s Case*.

(c) *Brand v. Lisley*.

has nothing in common with the case of a pawn. All the books treating of pawns treat them as in the possession of pawnee, where a pawn is compared to distress, and suppose that the custody of the pawn must be in the pawnee: *Mores v. Conham*, Owen 123; *Coggs v. Bernard*, 2 Ld. Raym. 917; Anonymous, 2 Salk. 522: but there is one case more, where the proper distinction between mortgage and pawns is taken,—*Ratcliffe v. Davis*, Noy 187, Cro. Jac. 244, Yelv. 179, 1 Bulstr. 29, where the court held there was a special property in pawnee, entitling to the custody till the condition is performed; but that, on payment, the whole property vested in pawnee; distinguishing it from a mortgage, *which is a conveyance of the thing.*" In 1 Smith's Leading Cases 196, it is further said, that "a pawn being a sort of bailment, transfer of the possession of the chattel pledged is of the essence of it; and, if the pawnee part with the possession, he loses the benefit of his security." Here the defendants had perfected their security by taking possession of the goods before the plaintiff's claim was put forward. The latter had no interest or property in the goods at the time of the sale; and clearly had no right to complain (whatever might be the right of Dolby) of the mode in which the defendants exercised the \*power of sale conferred upon them [\*461 by their deed. [ERLE, C. J.—It is put upon the ground that there was an interest in the chattels left in the mortgagor, which was capable of being assigned, and was assigned to the plaintiff.] The pawnor or mortgagor could not give to a third party a better right than he himself had. The deed gave the defendants very large discretionary powers as to the sale of the property: and the only person who could take advantage of any breach of duty in that respect, would be the person who could take advantage of a breach of the contract. [WILLIAMS, J.—Not necessarily so. In *Burnett v. Lynch*, 5 B. & C. 589 (E. C. L. R. vol. 11), 8 D. & R. 368, lessee by *deed-poll* assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease. A. took possession, and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against him: and it was held that the lessee might maintain an action upon the case founded in tort against A. for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage.] The distinction between a mortgage and a pawn is also recognised in *Franklin v. Neate*, 13 M. & W. 481.

ERLE, C. J.—In this action the plaintiff had recovered a verdict whereby he would have been indemnified for a great loss which he has sustained by having satisfied the claim of the landlord under a distress for rent which had been levied upon goods which had been conveyed to him by a bill of sale. The great difficulty I have felt, is, to find any law by which the \*plaintiff can be entitled to retain his verdict. I am unable to find any. He has brought [\*462 his action against the defendants for improperly and wastefully selling goods to which he claims a right. The defendants have pleaded, that, at the time of making the instrument under which the plaintiff

claims, and at the time of the sale, the goods in question had been assigned to them by the owner, and that they sold and disposed of them in their own right. In support of this plea, the defendants produced a deed which contains a skilfully elaborate conveyance of the goods to them, subject to a defeasance on payment of the mortgage-money by certain instalments. Now, if the property in these goods passed to the defendants by that instrument, their plea is made out. I have searched to the best of my ability to see whether we could regard the substance of the transaction, and say that it was a pawn of the goods, and that the mortgagor was a pawnor, and the parties taking pawnees, and so the former would have an interest which was capable of being conveyed to the plaintiff. But the frame of the instrument carefully excludes that: and I feel obliged to hold that the defendants are entitled to succeed. Another point urged before us was this,—The bill of sale under which the defendants claim purports to convey the property to The City Investment and Advance Company, and not to the defendants by name; and it was contended for the plaintiff that the goods could not pass to Sharpe and Baker. No doubt, Dolby considered that there was a company of which the one was manager and the other secretary. It is clear that individuals may carry on business under any name and style which they may choose to adopt: and I see no reason why the defendants may not do so under the name of The City Investment and Advance Company. If parties pretend to be a corporation, and \*presume \*463] to usurp the rights and powers of a corporate body as against the Crown, they may render themselves liable to be proceeded against for so doing. But, as between these parties, The City Investment and Advance Company are Sharpe and Baker, and consequently the conveyance in question is a conveyance to those individuals. I cannot therefore say that the deed was inoperative on this ground. It is unnecessary to say anything as to the point arising upon the seizure by the sheriff. The plaintiff will get the money which was paid in under the summons.

WILLIAMS, J.—I am of the same opinion. I have tried my best to find some mode of extricating the plaintiff from the difficulties which beset him in this case, which is one of great hardship: but I have tried in vain. The first question is as to the validity of the deed whereby Dolby assigned the goods in question to The City Investment and Advance Company. It has been objected on the part of the plaintiff that that conveyance is inoperative, because it is necessary in a grant that the grantees should be named, otherwise the grant can in law have no operation. I apprehend, however, it is fully settled that a grant may be good, though the grantee be not named by his christian or surname. In Sheppard's Touchstone, p. 236, the learned author, after discussing the consequences of a mistake in the christian name or surname of the grantee, goes on to say,—“And yet, if the grant do not intend to describe the grantee by his own name, but by some other matter, there it may be good by a certain description of the person, without either surname or name of baptism:” for, he adds, “Id certum est quod certum reddi potest.” In this case, I apprehend, the meaning of the grant is plain: the deed purports and intends to

convey the goods to those \*persons who use the style and firm of The City Investment and Advance Company. They may [\*464 or may not be a corporation: but, when it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them. The next question is, what is the nature of the grant, assuming that to be its operation. If it be competent to create a mortgage of personal property, this deed has certainly done it. It conveys the goods enumerated from the grantor to the grantees in the most full and explicit terms, so as to make the latter the owners thereof, subject only to the condition of the conveyance being defeated on performance of certain things by the grantor. That is a mortgage in the strict and proper sense of the term. It is said that there cannot be a mortgage of a chattel, and therefore that this instrument must operate as a pledge. But, why so? There is nothing illegal in making a grant in this form. The books recognise the distinction between a mortgage and a pledge of personal chattels: and there is an express authority in the case of *Flory v. Denny*, 7 Exch. 581, that there may be a mortgage of chattels, as distinguished from a pledge, without delivery; so that there would seem to be nothing contrary to law in what is ordinarily called a mortgage of personal chattels. The property is absolutely and indefeasibly vested in the grantee, if the condition be not performed: and a court of law can look at no other owner than the mortgagee or grantee. When, therefore, Dolby professed to assign these goods to the plaintiff, he had nothing to assign: the property was out of him. That being so, the plaintiff can have no right to complain of the manner in which the absolute owners have thought fit to deal with the property. It is true that there is a covenant in the deed under which the mortgagees could be made responsible to the \*mortgagor for any [\*465 misconduct in the exercise of the power of sale. If this had been an action by the plaintiff in the name of the mortgagor, it is possible he might have been entitled to recover compensation for any shortcoming in this respect. Or it may be, that, if recourse were had to a court of equity, the court would hold the mortgagees to be trustees in favour of the mortgagor or those to whom he has transferred his rights, and would give them a remedy for any abuse by them of their trust. We, however, can only look at such rights as the suitors have by law. We can, therefore, only regard the defendants as absolute owners of the goods in question; and consequently no action will lie against them at the suit of this plaintiff for dealing with them as they did.

WILLES, J., concurred.

BYLES, J., was sitting at nisi prius.

Rule absolute.

\*466]      \*IN THE EXCHEQUER CHAMBER,  
TRINITY VACATION, 1864.

DRESSER v. NORWOOD and Another. June 18.

A. placed timber in the hands of H., a factor, for sale on a *del credere* commission. B. bought it through the agency of C., a broker, who (as H. was aware) had prior knowledge of the fact that the timber was the property of A., and that H. was selling as factor only. C.'s knowledge of the relative position of A. and H., however, was not communicated to B., who made the purchase *bonâ fide*, although he was aware that H. was in the habit of selling timber as factor:—

Held,—reversing the decision of the Court of Common Pleas,—in an action by A. against B. for the price of the timber, that B. was affected by the knowledge of his broker C., and therefore could not set off against the price of the timber so bought for him a debt due to him from H.

Quære, whether H.'s ignorance of the state of knowledge of C. would make any difference?

THIS was an appeal against a decision of the Court of Common Pleas in an action brought by the plaintiff, a timber merchant in London, against the defendants, Russia merchants at Hull, for the recovery of 821*l.* 16*s.* 9*d.* for deals sold to the defendants in May, 1858.

1. The first count of the declaration was for goods sold and delivered, work and labour and materials, money paid, interest, and money due on accounts stated.

The second count stated, that, in consideration that the plaintiff at the defendants' request would sell and deliver to Marmaduke Chaplin certain deals and deal-ends at the price or sum of 9*l.* 10*s.* per standard hundred of deals, and 7*l.* 10*s.* per standard hundred of deal-ends, to be paid by the said M. Chaplin by cash within a month, less 2½ per cent. discount, the defendants promised the plaintiff that they would guarantee the fulfilment of the said contract of sale of the said deals and deal-ends by the said M. Chaplin: Averment, that, although the plaintiff, relying on the said promise, sold and delivered to the said M. Chaplin the said goods, at the \*467] price and on the terms aforesaid, and \*the said price of the said goods was long since due and payable to the plaintiff; yet the said M. Chaplin had not paid the price of the said goods, or any part thereof,—of which the defendants had notice; and that, although the plaintiff had performed all things to entitle him to a performance of the said guarantee, yet the defendants had not fulfilled the contract as aforesaid, or paid the price of the said goods, or any part thereof, and the same remained wholly unpaid: Claim, 400*l.*

2. The defendants pleaded,—first, to the first count, never indebted, —secondly, to the first count, that the said goods were bought by the defendants from, and were sold and delivered to them by, one J. W. Holderness, as the agent and factor of and for the plaintiff, with the plaintiff's privity and consent, in his the said J. W. Holderness's own name, as the true and sole owner thereof, and as for his own goods; and that the plaintiff did not appear nor was he known to the defendants as owner of or interested in the said goods at or before the sale or delivery of the said goods, nor until after the price thereof had become due, nor until after the accruing to the defendants of the debt

thereinafter mentioned; and that credit for the said goods and the time thereof was given to the defendants by the said J. W. Holderness, and not by the plaintiff: That the other causes of action therein pleaded to, accrued to the said J. W. Holderness, and not to the plaintiff, otherwise than through and by means of the said J. W. Holderness as his agent and factor, in respect of and in connection with and as incidental to the said sale of the said goods, and not otherwise, and before the plaintiff had appeared or was known to the defendants as the owner of or interested in the said goods; and that, before the time of the sale and delivery of the said goods, the defendants \*had given credit to the said J. W. Holderness for a large sum of money due and owing, from time to time, by drawing upon the said J. W. Holderness a certain bill of exchange dated the 20th of February, 1858, whereby the defendants required the said J. W. Holderness to pay to them the sum of 600*l.* four months after the date thereof, and which said bill the said J. W. Holderness accepted, but did not pay, although the said bill became due before this suit, and before and at the commencement of this suit was and still is in the hands of the defendants wholly due and unpaid: And that the amount of the said bill exceeds the sum claimed in the said first count; and that, out of that amount, the defendants were ready to set off the sum claimed in the said first count.

The defendants also pleaded to the second count,—thirdly, that they did not promise as alleged,—fourthly, that the plaintiff did not sell or deliver to the said M. Chaplin the goods therein mentioned, in manner and form as in that count alleged,—fifthly, that the price of the said goods never did become payable from the said M. Chaplin to the plaintiff, in manner and form as in that count alleged. Issue thereon.

3. The cause was tried before Erle, C. J., at the sittings at Guildhall after last Michaelmas Term, when the following evidence was given:—

Henry Dresser, called on behalf of the plaintiff, stated,—“I am the plaintiff, a merchant and shipowner in London. In September, 1857, I sent several cargoes of timber to Hull; amongst them two cargoes by the ships Beatrice and Amelia Hillman. These cargoes consisted of Kiana red wood deals and ends, and were shipped from the Kiana mills. I employed J. W. Holderness, of Hull, to sell these cargoes for me. He was a commission-merchant and auctioneer. He sold by auction. In October, 1857, I sent my \*managing clerk, Buckland, to Hull, to Holderness. I instructed him to get an acknowledgment from Holderness about the goods. On his return, Buckland handed me the following letter from Holderness:—‘Oct. 2d, 1857. We hold to your order, as per conditions in our favour of 24th July, the following cargoes, Beatrice, Amelia Hillman.’”

The letter of the 24th of July, from Holderness to the plaintiff, was produced and read, as follows:—

“We have your letter of the 22d, and in reply will take charge of the cargo per St. Lawrence, from Wyburg, on the following terms, 2½*d.* per standard per week rent, 4*s.* 6*d.* per standard landing charges and the usual commission and del cred., or ½ per cent. if not sold by us.

“J. W. HOLDERNES & Co.”



"In February, 1858, I sent Buckland to Hull again. I did not hear of the sale till after Holderness's bankruptcy. I sent Buckland to Hull again after the bankruptcy."

Cross-examined: "The cargoes were put up to auction by Holderness. I did not attend the sale. I received a catalogue. I dare say I looked at it. Probably I destroyed it. I do not think I had more than one catalogue sent by Holderness. My impression at the time of receiving the catalogue, was, that Holderness was the auctioneer. I never understood him to be the merchant. Ward was Holderness's clerk. Holderness may have been described in the catalogue as merchant; but I did not observe it. I drew bills of exchange on Holderness against the cargoes. Three bills were drawn by me on Holderness, for 955*l.*, 455*l.*, and 655*l.* respectively. Some of them are those now produced. They were drawn before Holderness's bankruptcy, and were never paid. He became bankrupt in June, 1858."

\*470] Re-examined: "I did not know whether or not Holderness was an importer on his own account. I understood that he acted entirely as a broker and commission-agent. I think, that, when I sent him the cargoes in question, he had five or six other cargoes of mine in his hands, to the value of from 16,000*l.* to 20,000*l.*: at all events, they were very large cargoes. Holderness was a del credere agent. I have never been paid for these goods."

J. W. Holderness: "I was a commission-agent at Hull. I was in the habit of selling by auction goods consigned to me. One of my clerks was the auctioneer: he had a license; I had none. Chaplin, who died a few months ago, was my clerk for some time: after him, Ward. I had timber consigned to me by various merchants, for sale: not all on commission; I imported also myself. I had several cargoes consigned to me by plaintiff in August and September, 1857. I remember the two consignments by the Beatrice and Amelia Hillman. I had sold cargoes for the plaintiff on commission before these two. I was known in Hull as a commission-agent. I had sold on commission for the defendants, who are merchants at Hull. Chaplin had been my clerk: he had left me when those cargoes came. I remember Buckland coming down and getting the acknowledgment which has been read. After Chaplin left me, he set up in business on his own account as a broker. He applied to me to purchase part of these two cargoes. I believe he knew whose timber it was. He applied to purchase a portion of the Amelia Hillman's cargo. He brought a specification with him; applied for what was therein specified. I ultimately came to terms with him. He made out a bought-note. I remember his bringing me this contract,—

\*471] "Bought of Messrs. J. W. Holderness & Co., Hull, for my principals

"20 St. P. std. 8 × 11 in. Kiana red wood } deals.

"10 St. P. std. 8 × 9 in. do. do. }

"At 9*l.* 10*s.* per St. Petersburg standard hundred.

"Also 539 pieces of Kiana deal-ends, at 7*l.* 10*s.* do.

"Payment by cash within a month, less 2½ per cent.

"M. CHAPLIN."

"He asked me for a delivery order. I asked him for the name of his principals. He declined to give me their names; stating that they

resided in the country. He said they did not wish their names to be given; that he had bought on the dock side for the same parties without giving their names. After some further conversation, he asked me if I would take a banker's guarantee or a merchant's guarantee, which I agreed to do, in payment. He called a short time afterwards, and asked me if I would take Norwoods' (the defendants') guarantee; which I consented to do, and he brought it. This is it,—

“‘Hull, June 2d, 1858.

“‘Messrs. J. W. Holderness & Co.

“‘Dear Sirs,—In compliance with your request, we beg to state that we are willing to guaranty the fulfilment of the contract for deals, &c., as made with you by Mr. Chaplin on 31st May last, having given him authority to declare us as principals.

“‘C. M. NORWOOD & Co.’

“I had three or four interviews with Chaplin during the negotiation for this purchase. I do not know that it was mentioned whose the goods were. *At that time Chaplin was perfectly aware they were Dresser's goods.* I think that in conversation I said to Chaplin that I did not know whether Dresser would take that price or not. That was before Chaplin bought them. We were two or three days, and had several interviews \*before we arrived at the price. I believe the first interview took place with a clerk of mine, Mr. [472 Ward, and he named it to me. Then I saw Chaplin myself. He had been managing clerk eighteen months. He had sold for me as my clerk, having an auctioneer's license; and he knew the nature of my business perfectly. Upon receiving the guarantee, he got a delivery order for the goods, and they were delivered to him. At this time I was in difficulties, and was pressed by my bankers. Holden & Sons were the solicitors of my bankers, and of the defendants also. They were also my solicitors: and they made me bankrupt ten or twelve days after the sale, and were the solicitors of the assignees. I was the acceptor of a bill of exchange drawn on me by defendants at four months from the 20th of February, 1858, for 600*l.*, which was then running. I had known defendants for several years. I had sold for them on commission during the year 1857. I had never known defendants make a similar purchase before. They had no yard to store timber in.”

Cross-examined: “The sale for defendants was of a cargo by the Windsor from Riga. It was stored on premises which I occupied. The cargo was sold at various times, from December, 1856, to October, 1857. Only one other cargo was ever consigned to me for sale by defendants; and that was the cargo against the price of which the 600*l.* acceptance, the subject of the present set-off, was drawn. I imported largely on my own account, and had an establishment on my own account at St. John's, New Brunswick, and imported largely from thence. I had large sales of timber at Hull: and, when I had a sale, I had catalogues in the form produced published and circulated.” [Catalogues of sale of timber were here put in evidence by defendants' counsel, in which Holderness was described at foot as “merchant,” Ward as “auctioneer.”]

\*473] \*"I kept my own timber and the timber consigned to me by plaintiff in the same yard, except the cargoes which had been landed prior to plaintiff's placing them in my hands. I mean except those which had been landed by some other brokers. The catalogues were always in the same form, stating me to be the merchant, and my clerk, Chaplin, or Ward, as the case might be, the auctioneer. I never distinguished in the catalogues what timber belonged to myself, and what to other persons who had consigned it to me. Chaplin left me in 1857. I had a sale in March, 1858. Ward was then the auctioneer. Some of plaintiff's timber was included in the printed catalogue for that sale. I sent a catalogue to plaintiff. The mark by which I distinguished plaintiff's timber in the catalogue is a manuscript mark in my own printed catalogue, that is to say, in the copy kept for my own private use. In the copy sent to plaintiff, I think there was generally a mark to show him that the timber marked there was his. The ship's name was not mentioned in the catalogue, nor the import mark. I might probably put a mark against plaintiff's timber in the catalogue I sent him, to draw his attention to it. That was the custom. Chaplin left me in January, 1857. He became bankrupt soon after. He died a few months ago. I became bankrupt soon after the delivery to the defendants of this timber, and paid no dividend. I feel confident Mr. Dresser's name was mentioned to Chaplin. Not during the negotiation. I will not swear that plaintiff's name was mentioned between me and Chaplin during the conversation or during the negotiation as to this sale; but *I will swear that Chaplin was perfectly aware the goods were plaintiff's, from previous conversations.* I knew Chaplin was a broker when the bought-note was given. I asked for the name of his principals, and \*474] he declined \*to give it. He subsequently brought me defendant's letter, which I call the guarantee. I looked upon it as a guarantee. After getting that letter, I made out and delivered the invoice."

The invoice was put in by the defendants' counsel, headed as follows:—

"Hull, 5th June, 1858.

"Mr. M. Chaplin, for his principals,

"Bought of J. W. Holderness & Co."

[Here follows an account of the timber the subject of the sale, and the prices, amounting to £217. 16s. 9d.]

Re-examined: "The catalogues are in the same form as I have always used when I sold for the defendants. I used to send them catalogues in the same form. This is the usual way in which I make out my invoices. I never sent my principals copies of the invoices or of the contracts. I used to send them the account-sales when the cargoes were sold. The plaintiff's goods were not sold by auction."

Plaintiff recalled: "Chaplin applied to me about these cargoes when they were in course of landing at Hull, in 1857. He came to London, and called at my office, and told me that he understood I had several cargoes in Hull, and he wished me to place them in his hands for sale. The ships' names were mentioned. The *Amelia Hillman* was one of them. I told him I could not do so, because I had entered into an arrangement with Holderness, by which I should have

to sell them through him, and should have to pay him  $\frac{1}{2}$  per cent. even if I sold them through any one else, and therefore, if he (Chaplin) sold them, I could only allow him  $\frac{1}{2}$  per cent."

Isaac Borthwick Ward: "I became clerk to Holderness about August, 1857. Chaplin had then left. I recollect Holderness having some of plaintiff's timber for sale; amongst others, the cargo of the *Amelia Hillman*. It is called Kiana red wood deals. The name is peculiar. It is where the wood comes from. I believe [\*475 it was known in Hull at that time who imported the Kiana red wood deals. I think there was only one importer of those deals, viz. plaintiff. The sale of the lot to Chaplin began by a negotiation between me and Chaplin. I saw him several times before we agreed on the price. At length the bought-note of 31st May was drawn up and signed. At the time he was purchasing, I asked him who the goods were for. He declined to name. I still pressed him. I knew he had been a bankrupt not long before; and that Holderness would not trust him alone. I pressed him for his principal's name. He still declined to disclose it. I then said I must speak to Holderness. I was present at the interview between him and Holderness. Holderness asked him for the name of his principals. Chaplin asked if he could get a guarantee from some respectable party (bankers or merchants), would that satisfy him. Holderness said yes, that would do, if it was from any party of whose respectability he was satisfied. He afterwards brought defendants' note or guarantee of 2d June, 1858. Nothing passed between me and Chaplin during the negotiation for the sale about plaintiff. *I should think he knew whose goods they were. I think so from his having been in Holderness's service.* The defendants are commission-merchants and steam-ship owners in Hull. I never knew them purchase wood goods such as these before or since."

Cross-examined: "Defendants hold a high position in Hull, and do a large business there. Chaplin became bankrupt early in 1857. He left Holderness in January, 1857. Shortly afterwards, he became bankrupt, and then commenced business as a commission-agent."

\*J. W. Buckland: "I am now a member of plaintiff's firm, and was plaintiff's managing clerk in 1857 and 1858. I went [\*476 down to Hull to see Holderness when the cargoes were there. I procured the acknowledgment from Holderness in October. I know Chaplin. I have met him several times; but I don't recollect seeing him in October, 1857. I went to Hull again in February, 1858, and saw Chaplin there. I had some conversation with him about the *Amelia Hillman* and *Beatrice*. He was speaking about cargoes generally, what plaintiff had for sale in Hull; and he made me an offer. I told him there were certain cargoes in Holderness's hands; and I recollect very well telling him some of the particular cargoes that Holderness had there. I believe I mentioned the *Asia*, *Amelia Hillman*, and *Beatrice*. Chaplin made me an offer for a portion of one of the cargoes. We came to no terms. I submitted the offer to plaintiff, and he did not accept it. Chaplin knew that I represented plaintiff."

Cross-examined: "In February, 1858, there were four cargoes of plaintiff's in Holderness's possession: only four, I think."

This was the plaintiff's case.

Charles Morgan Norwood, one of the defendants, stated: "I am a merchant at Hull, in partnership with my brother, the other defendant. In May, 1858, I employed Chaplin to purchase some timber of Holderness. Chaplin was a wood-broker. He had been a bankrupt within a year before. In the spring of 1858, I had the 600*l.* bill becoming due. It was drawn in February, and became due on the 28d of June. At the end of May I instructed Chaplin to buy some deals of Holderness, if he could get them. Chaplin called on me at my office on the evening of the 27th of May. He told me that he should be at Holderness's sale; that the goods were selling at extremely low \*prices; and that several of the wood-merchants \*477] in Hull had made purchases; and he recommended me to purchase. He said, 'Things are going below the cost price; there are some lots unsold at the sale, and I can buy some for you.' I had known Holderness to be a large importer; and in two instances he had sold for me. That was the only reason I had for supposing that he was a factor. Chaplin never said anything to lead me to think that Holderness was selling for any one but himself. He said nothing about it. He showed me the catalogue, and pointed out to me where the lots were. The next day I told Chaplin, that, if he could purchase for me very cheaply the goods pointed out in the catalogue, he might; and I received the contract-note from him on the 31st of May. The next time I saw Chaplin, I think, was on the 2d of June; and he said that Holderness had asked for the name of his principals, or a guarantee, one or the other. That was the way in which he put it. In consequence of that, I wrote the letter to Holderness of the 2d of June, which has been read. A day or two after, we received the invoice. The goods were at Hull, in Holderness's yard. My brother, the other defendant, was absent from England, and took no part in the transaction. On these occasions, the seller pays the commission. I paid no commission."

Cross-examined: "I had employed Chaplin before several times. I had never bought of Holderness before. I bought the timber because I heard it was cheap. I did not buy to set off. I did not want the timber, except to sell again, and make a profit of it if I could. I have bought cargoes of timber. My ships often bring me small quantities. I have not been in the habit of buying small quantities. I have known Holderness for some time. I have consigned two cargoes to Holderness for sale. I have sold him many \*478] \*cargoes previously. The cargoes of my own which I sent to him as factor were put into his catalogue with the other timber, and invoices made out in the same way. I always took advances for the goods. I did not interfere in any way. I did not know he was a general factor. The reason I placed the two cargoes in his hands was this:—It was at the crisis of 1857 and 1858; and, it being a time of depression, I could not sell deals in the ordinary way, except at a great sacrifice. Holderness offered to put them in his catalogue. I should not have given them to him, had they not been wholly unsaleable in the usual way. He sold very largely, and very frequently. I had a notion that the timber was his own. He was concerned in a very large timber-trade in New-Brunswick. I had

an impression that by far the greater part of the timber he sold was his own. My only reason for thinking that he sold for others, was, because he sold for me. I know of no other case. I did not know of Holderness being in difficulties: the only thing that struck me, was, Chaplin's statement that at the sale of the 27th of May the goods were sold at very low prices; in fact, at a sacrifice. This was to my mind an unsatisfactory circumstance. When I authorized Chaplin to buy, I intended to pay in cash. I did not know Holderness to be in the position he was. It did not occur to me to set off until the bill became due. Holderness became bankrupt a few days before the bill became due."

Re-examined: "I had never employed Chaplin, except as a broker. I believed the timber to be Holderness's. There was a sale by auction on the 27th of May, out of which this arose."

4. Before the summing up of the case to the jury, a discussion arose as to the meaning of the second plea, and as to the effect of the evidence. The counsel for \*the defendants contended, that, if Holderness, being the plaintiff's factor for sale, and intrusted with the goods for that purpose, sold them to the defendants as the real owner, the defendants not knowing that the plaintiff was the real owner, the second plea was proved, notwithstanding that the plaintiff might not have intended or expressly authorized Holderness to represent himself to the purchasers as the real owner of the goods, or to sell them as such, and, notwithstanding that Chaplin knew that the goods were the plaintiff's, and not Holderness's.

The counsel for the plaintiff, on the other hand, contended that the plea was not proved, unless the jury should be of opinion that the sale by Holderness was made with the actual privity and consent of the plaintiff to his holding himself out as the true owner of the goods, and should also be of opinion that Chaplin as well as Norwood was ignorant at the time of sale of the fact that the plaintiff was the real owner of the goods.

5. The Lord Chief Justice left the following three questions to the jury, reserving, by consent, to either side to move the court on any question of law which might remain open after the jury had answered the questions left to them:—

First. Did Holderness sell the goods as his own, with the plaintiff's consent? To which the jury answered "No."

Second. Did Norwood know, when Chaplin purchased the goods, that the plaintiff was the owner? To which the jury answered "No."

Third. Did Chaplin know, when he made the purchase, that the plaintiff was the owner of the goods? To which the jury answered "Yes."

6. Upon these findings, the learned judge ordered the verdict to be entered for the plaintiff for 321*l.* 16*s.* 9*d.*, being the amount of the invoice; but gave leave to the defendants to move to enter the verdict for them on the second plea, if the court should be of opinion, that, upon the evidence and findings above stated, it ought to be so entered.

A general verdict for the plaintiff for 321*l.* 16*s.* 9*d.* was thereupon entered: but the plaintiff had not claimed to recover on the second count, and in fact abandoned that count at the trial; and the entry of

the verdict for the plaintiff on the issue joined on the pleas to that count was in reality so made only upon the understanding that it was to follow the verdict upon the first count.

7. In Hilary Term following, the defendants accordingly obtained a rule calling upon the plaintiff to show cause why a verdict should not be entered for the defendants pursuant to the leave reserved, on the ground, that, upon the facts proved, the defendant was entitled to the verdict; or why a new trial should not be had between the said parties, on the ground of misdirection, or that the verdict was against the evidence with reference to the timber having been intrusted to Holderness for sale on a *del credere* commission, and possession having been given to him and advances made by him, and the sale having been made in his name.

The rule came on for argument in Easter Term, 1863, when the court ordered that the verdict for the plaintiff should be set aside on all the pleas except the first, and that, instead thereof, a verdict should be entered thereon for the defendants.

9. The catalogue and other documents put in evidence at the trial were to form part of this case, and to be referred to by either party.

The case was argued in the Exchequer Chamber, before Pollock, C. B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., and Shee, J.

\**J. Brown* (with whom was *Lush*, Q. C.), for the plaintiff, \*481] urged substantially the same arguments that were urged by them in the court below, in addition to the cases referred to upon that occasion citing *Seaman v. Fonereau*, 2 Str. 1188; *Fitzherbert v. Mather*, 1 T. R. 16; *Cornfoot v. Fowke*, 6 M. & W. 358; and also *Paley's Principal and Agent* 259, and *Sugden's Vendors and Purchasers*, 13th edit. pp. 621, 623, 626.

*Bovill*, Q. C. (with whom were *Manisty*, Q. C., and *C. Hutton*), for the defendants, referred to *Worsley v. The Earl of Scarborough*, 3 Atk. 392, and *Hiern v. Mill*, 13 Ves. 120, and to 1 *Story's Equity Jurisprudence* 480, and the notes to *Le Neve v. Le Neve*, 2 *Tudor's Cases in Equity* 21.

*Cur. adv. vult.*

POLLOCK, C. B., delivered the judgment of the court:—We are all of opinion that the judgment of the court below ought to be reversed. We think, that, in a commercial transaction of this description, where the agent of the buyer purchases on behalf of his principal goods of the factor of the seller, the agent having present to his mind at the time of the purchase a knowledge that the goods he is buying are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, is the knowledge of the principal. It seems to be conceded, that if, at the time of the sale, the factor of the seller had expressly told the agent of the buyer that the goods were not his property, but the property of his principal, it would not have been a case for a set-off. But, why should the factor tell the buyer's agent that which he was well aware that the agent already knew? The knowledge of the factor of the seller that the buyer's agent was aware that he was only the factor, in our judgment \*482] makes the case perfectly clear. But it is not to be understood that we mean to admit that the case would have been different if the factor was ignorant that the knowledge of that fact

was present to the mind of the buyer's agent, provided it really was so present. Judgment reversed.

Since the case of *Fitzherbert v. Mather*, 1 T. R. 15, it has been an undoubted rule of law, that notice to an agent is notice to his principal. "On general principles of policy," says Ashurst, J., in that case, "the act of the agent ought to bind the principal, because it must be taken for granted that the *principal knows whatever the agent knows*."

But what shall be deemed sufficient, in the case of constructive notice to a principal, in order to bind him through his agent, has been the source of considerable litigation; and the law on the subject not being always satisfactorily stated, together with the undue deference shown to precedents, has resulted in restrictions being engrafted on the rule, which have only been removed by the decision in the above case.

In *Warrick v. Warrick*, 3 Atk. 290, where the question as to constructive notice to a principal arose on a contest for priority, between the son of one Thomas Warrick, claiming as purchaser under articles made by his father before marriage, and the defendant Kniveton, as assignee of a mortgage made by the said Thomas Warrick after marriage; it was contended on the part of the plaintiff that Kniveton had notice through his attorney, the evidence of notice being that the attorney who engrossed the mortgage made in 1736, and the subsequent assignment, said to certain witnesses in 1735, that if Thomas Warrick could not cut off the entail under the settlement, made in pursuance of the articles, to raise money, he must go to gaol, but that he had seen the settlement and thought it could be done. Lord Chancellor Hardwicke, in delivering his opinion, says, "Consider what kind of notice the defendant had: the attorney had no notice at the time he drew the assignment, but be-

fore even the original mortgage, the notice should be in the same transaction; and this rule ought to be adhered to, otherwise it would make purchasers' and mortgagees' titles depend on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have knowledge of former transactions;" and he cites the case of *Fitzgerald v. Falconberg*, *Fitzgibbon* 207, as an authority to sustain him; but the question of notice there was unnecessary to its determination, and was only incidentally alluded to by the Master of the Rolls, and not at all by the Chancellor whose decision was against the parties alleging want of notice, though it was not rested on that ground. No evidence was given in *Warrick v. Warrick* as to whether or not the attorney had the knowledge of the settlement in his mind at the time he acted for the defendant, and the decision went on the broad ground, that such knowledge was acquired in a former transaction, and the rule of notice to an agent being notice to his principal, must be restricted to the same transaction.

*Warrick v. Warrick* was followed by *Worsley v. The Earl of Scarborough*, 8 Atk. 392, the same Chancellor saying, "It is settled that notice to an agent or counsel who was employed in the thing by another person, or in another business and at another time, is no notice to his client who afterwards employs him."

In *Brotherton v. Hatt*, 2 Vernon 574, decided by Lord Cowper in 1706, where A. made several mortgages to B., C., and D., and in the last B. was a party and agreed that he would stand as trustee for D. after he was paid, it was decreed that C. should be paid before D., for all the mortgages were



made by the same attorney or scrivener, and he having notice of C.'s mortgage was notice to D. There was no evidence that notice of C.'s mortgage was brought home to the scrivener at the time of the execution of D.'s; and C.'s transaction was undoubtedly a prior one; yet there is no mention made in the opinion of the Chancellor of restricting the rule of law as to notice to an agent being notice to his principal, to the same transaction, and there is certainly no more reason for supposing that the knowledge of the prior encumbrance was in the mind of the attorney or scrivener in the latter case, than in *Warrick v. Warrick*. The knowledge of the agent in *Jennings v. Moore*, 2 Vernon 609, was likewise prior to his employment as agent, and yet the principal was held bound by the notice.

A leading case on the subject of notice is *Le Neve v. Le Neve*, decided by Chancellor Hardwicke and reported in 3 Atk. 646, where it was held, on a bill brought to set aside second marriage articles and settlement on the ground of notice of a prior settlement, that the wife of the defendant Edward Le Neve was affected by notice of a settlement made by her husband on a former wife, through the attorney retained by her to draw up the second articles; the attorney who was employed by the wife on the recommendation of her husband, swore that he had notice of the first articles some time before the second marriage, having been furnished with a copy by the husband in order to take counsel's opinion how to secure against their effect. The Chancellor says "there cannot be stronger notice."

The distinction, if any exists, between *Warrick v. Warrick* and *Le Neve v. Le Neve* must be in the fact that in the latter the attorney admitted that he had notice of the prior transaction, while in the former he was dead and

could not be examined, and therefore it depended upon the evidence of others, which may have rendered it more doubtful; at any rate it is evident that the Chancellor was constrained in view of the direct testimony as to notice, for in other respects the cases were similar: in one, the attorney employed to engross the mortgage, and in the other prepare the deeds, had notice of a former settlement, and that too, particularly impressed upon his mind, his object in both being to avoid its effect, while as far as appears, such notice was prior to the transaction in which he was engaged, when the principal was to be affected, yet the decision in *Warrick v. Warrick* was not placed on the ground of the insufficiency of notice, but on the broad one, that the rule of notice must be restricted to the same transaction.

The first instance in which the doctrine laid down in *Warrick v. Warrick* is openly questioned, is in *Mountford v. Scott*, 1 Turner & Russell 274, where, on appeal from the Vice-Chancellor, Lord Eldon expresses his dissatisfaction with the restriction, in the following forcible language: "The Vice-Chancellor in this case appears to have proceeded upon the notion, that notice to a man in one transaction is not to be taken as notice to him in another transaction; in that view of the case it might fall to be considered, whether one transaction might not follow so close upon the other, as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening; *it must in all cases depend upon the circumstances.*"

When the case was before Sir John Leach, V. C., the rule of restriction was fully maintained; he says: "Notice to an agent is notice to his princi-

pal, but he cannot stand in the place of principal, until the relation is constituted, and as to all information previously acquired the principal is a mere stranger."

Though the case was finally disposed of on another ground than that of notice, and therefore Lord Eldon's remarks lack the force of a judicial opinion, they are entitled to great weight as showing the inclination of his mind, and the difficulty experienced in adhering to the strict rule, when notice is actually brought home to the agent, even though such notice is acquired in a previous transaction. The Chancellor endeavoured to obviate the difficulty, by saying the cases must depend upon circumstances, in other words, the time at which the agent receives notice, and this seems perfectly just; but if the element of time is introduced the rule of *Warrick v. Warrick* falls, and it becomes a question of evidence and not law.

The principle laid down in the foregoing case is maintained in *Winter v. Lord Anson*, 3 Russell 488; and in *Hargreaves v. Rothwell*, 1 Keen 159, the Master of the Rolls, Lord Langdale, said he was clearly of opinion that where one transaction was closely followed by, and connected with another, or where it was clear that a previous transaction was present to the mind of a solicitor when engaged in another, there was no ground for the distinction by which the rule of notice had been restricted to the same transaction,—a proposition fully sustained by Chancellor Cottenham on appeal, who in commenting on the opinion of Lord Eldon in *Mountford v. Scott*, says: "Though the judgment turned upon a point entirely different, which rendered the question of notice immaterial, his observations on the subject are *extremely important*, and in those observations I entirely concur."

Notwithstanding the evident dispo-

sition of the Chancellors in the two preceding cases, to abolish the restrictions on the rule, the propriety of any departure from the doctrine of *Warrick v. Warrick* was strongly questioned by Wigram, V. C., in *Fuller v. Bennett*, 2 Hare 394.

In this case, after the commencement of a treaty for the sale of an estate by A. and the purchase of it by B., A. agreed to give C. a mortgage, and notice of the agreement was given to the solicitors of B. The treaty for the sale afterwards ceased to be prosecuted for five years, when A. died and B. bought from his heirs. B. mortgaged the estate to D., and the same solicitors prepared the mortgage for D. as were concerned in the original treaty by B. Now, although it was held that B. and D. had constructive notice of the agreement with C. through their solicitors, which is incompatible with the strict rule of *Warrick v. Warrick*, still the Chancellor was unwilling to admit the authority of *Mountford v. Scott*, saying: "If in order to decide the present cause, it were strictly necessary that I should decide as an abstract question that a purchaser who for the first time employs a solicitor [not being also the solicitor of the vendor], can be affected with constructive notice of anything known to the solicitor, save that of which he acquires notice after his retainer, and during his employment by the purchaser, I should certainly feel great difficulty in coming to the conclusion."

Such is a brief review of the English authorities, on the subject of notice to an agent being notice to his principal, with the restriction imposed on the same. And although there have been attempts to escape from the rule laid down by Lord Hardwicke, it has never been fully accomplished, until the judges in *Dresser v. Norwood*, by a unanimous judgment, held that the knowledge of an agent is the know-

ledge of his principal, and his principal is affected thereby, whether such knowledge be acquired by the agent in the course of his employment or otherwise: a rule far more likely to promote good faith and fair dealing in commercial transactions, than the previous one.

In this country, in most of the states, the doctrine of the English cases has been only too strictly enforced, and a rigid adherence to precedent without discrimination, has placed the law as regards restricting the knowledge of the agent, which will affect his principal, on the same ground as it was in England prior to the case of *Dresser v. Norwood*, that is, to such knowledge as is acquired in the same transaction.

Thus, in Pennsylvania, in the case of *Hood v. Fahnestock*, 8 Watts 489, it was held, that the knowledge of an attorney, of a trust, obtained from drawing a deed, would not affect a purchaser for whom he afterwards made a conveyance of the title; Sergeant, J., in his opinion using the following language: "It is now well settled that if one in the course of his business as agent, attorney, or counsel for another, obtain knowledge from which a trust would arise, and afterwards become the agent, attorney, or counsel of a subsequent purchaser, in an independent and unconnected transaction, his previous knowledge is not notice to such other person for whom he acts; to visit the principal with constructive notice, it is necessary that the knowledge of the agent or attorney should be gained in the course of the same employment."

In a subsequent case, *Bracken v. Miller*, 4 Watts & Serg. 111, where the knowledge was acquired some years previously, the same judge says, "That at best, it is rather a dubious ground on which to conclude that the

principal had notice, because for various reasons the agent may not communicate his knowledge to his principal, although strictly it might be his duty to do so." But the rule was adopted on the ground of public policy, and to promote good faith, and therefore an exception, like that alluded to by the judge, is entirely foreign to a proper consideration of the subject.

It is said, in the case of *Bank of United States v. Davis*, 2 Hill 452 [New York], "the rule is undisputed that notice to an agent is notice to his principal, if the agent comes to the knowledge of the fact while he is acting for the principal, in the course of the very transaction which becomes the subject of the suit;" the point discussed did not properly arise in this case, as the notice was acquired in the same transaction, but in *The New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468, the question was fairly raised.

An agent by whom an insurance was effected, had previously received instructions from the insurers, who were then his principals, and it was held, that the insured were not to be deemed as having notice of such instructions through their agent; Nelson, J., remarking, "That though the law is general, that whatever is known to the agent must be presumed to be known to the principal, I am inclined to think that the better opinion is, that this rule is confined to that class of cases, where the knowledge of the fact comes to the agent while he is acting for his principal, in the course of the very transaction which becomes the subject of the suit."

This was quite as strong as the case of *Warrick v. Warrick*, for the knowledge of the fact by the agent was unquestioned. See the cases of *Brown v. Montgomery*, 6 Smith N. Y. 287; *Jackson v. Sharp*, 9 Johnson 168.

The same rule is apparently held in

Iowa, in *Keenan v. Missouri Ins. Co.*, 12 Iowa 126; in Connecticut, in *Farmers' and Citizens' Bank v. Payne*, 25 Conn. 444, where *The Bank of United States v. Davis* is cited with approbation.

In South Carolina, in *Pritchill v. Sessions*, 10 Rich. Law. 293, the rule as to the time when it is necessary for the agent to have received notice, was slightly modified, the court saying, "Unless the notice comes to the agent while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice to his principal." This is following in the footsteps of *Mountford v. Scott*, by making the rule depend upon the time the agent receives notice.

Likewise in Illinois, in *Williams v. Tatnall*, 29 Ill. 553, where the knowledge of the attorney was acquired *shortly before* his retainer by the purchaser, the court intimated that the latter was affected with notice. See also *Wiley v. Knight*, 27 Ala. 336.

In Kentucky, however, the rule of restriction was maintained in all its vigor; the question came up in *Willis v. Vallette*, 4 Metcalf 186, where it was sought to affect a subsequent encumbrancer with constructive notice of a prior lien, and the court said, "We need not decide whether the agent or trustee had notice or not, because such notice, if given, was pre-

vious to the time he became such for this principal, and consequently cannot affect him."

The leaning of the Court in *Bierce v. Red Bluff Hotel*, 31 California 160, seems the same as in the last case.

The honour belongs to Vermont, of having laid down the law on this subject, in the only way in which it is possible to promote that spirit of good faith and fair dealing so essential in all commercial transactions, and the case of *Hart v. Farmers' and Mechanics' Bank*, 83 Vt. 252, rests the law of agent and principal, so far as concerns the knowledge of the former, upon the soundest principles of common sense and natural justice, while establishing, in that state at least, the same doctrine which the English courts were afterwards compelled to adopt in the foregoing case of *Dresser v. Norwood*.

In *Hart v. Farmers' and Mechanics' Bank*, an attaching creditor was held chargeable with notice of the fact, that the property attached was held by his debtor in trust, from his attorney being aware that such was the case, though his information was prior in time to his employment by the attaching creditor. The judge, Redfield, in his opinion, places the judgment on the only really tenable ground, namely, that the agent, when employed, must be presumed to have communicated, as he is in fact bound to, such knowledge as is in his possession at the time.

## LEE and Another v. JONES.

One P. had been employed by the plaintiffs in the sale of coals for them on commission, for which he at the end of each month gave them his acceptances, and by the terms of his agreement he was to hand over to them within six days all moneys he received from customers. P. having fallen in arrear to the extent of 1272*l.*, the plaintiffs required him to find security to the amount of 300*l.*, and at his request the defendant consented to guarantee 100*l.* The agreement of guarantee recited the terms of dealing between the plaintiffs and P.; but the fact that P. was already indebted to the plaintiffs in the large sum above mentioned was concealed from the sureties.

In an action against the defendant upon the agreement, he pleaded that he was induced to make it by the fraudulent concealment by the plaintiffs of a material fact:—Held, by Crompton, J., Channell, B., Blackburn, J., and Shee, J., in the Exchequer Chamber,—affirming the judgment of the court below,—that the non-communication by the plaintiffs to the defendant of the fact that P. was at the time indebted to them, was evidence for the jury in support of the plea,—Pollock, C. B., and Bramwell, B., dissenting.

THIS was an appeal under the Common Law Procedure Act, 1854, against a decision of the Court of Common Pleas discharging a rule nisi to enter a verdict for the plaintiffs for 100*l.*: see 15 C. B. N. S. 386 (E. C. L. R. vol. 109).

The cause was tried before Erle, C. J., at the sittings after Michaelmas Term, 1862, for the county of Middlesex, when a verdict was found for the defendant,—leave being reserved by the judge at the trial to enter a verdict for the plaintiffs for 100*l.*, if there was no evidence to support the defendant's plea of fraud hereinafter referred to.

The following are the facts of the case:—

1. The plaintiffs, at the time of the making of the agreement upon which the action is brought, were in partnership with one John J. Jerdein (who died before this action was commenced), as coal-merchants.

\*This action is brought to recover the sum of 100*l.* on an  
\*483] agreement made between the plaintiffs and John J. Jerdein and the defendant and others.

The following is a copy of this agreement:—

"An agreement made this 3d day of October, 1861, between Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, of the one part, and Messrs. Lee & Jerdein, of Lancaster Place, Strand, in the county of Middlesex, coal-merchants, of the other part: Whereas, James Packer has for some time past been a salesman of coals upon commission for the said Messrs. Lee & Jerdein, he the said James Packer giving bills of exchange to the said Lee & Jerdein for all such coals as may be delivered to his order, such bills being floating bills to be settled for and paid up at the expiration of the current months during which such bills are respectively running: And whereas the said Lee & Jerdein requiring security from the said James Packer, they stipulated (amongst other things) that the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel should give them a floating and continuing guarantee for the term of three years from the date hereof, on behalf of the said James Packer, to secure to them the said Lee & Jerdein the amount of any balance which might at any time or times be due to them the said Lee & Jerdein from the said James Packer upon any such coal-account on bills, to the amount of 300*l.*, in the proportions following, that is

to say, the said Neville Cattlin Sendall in the sum of 50*l.*, the said George Theobald in the like sum of 50*l.*, the said John Gunning Antrobus in the like sum of 50*l.*, the said Charles Jones in the sum of 100*l.*, and the said Hugh William Ruel in the sum of 50*l.*, making together the said sum of 300*l.*; and, in order to induce the said Lee & \*Jerdein to continue the said arrangement with [\*484 the said James Packer, the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, agreed to enter into this agreement for guarantee in manner hereinafter appearing: Now this agreement witnesseth, that, in consideration of the said Lee & Jerdein agreeing to allow the said James Packer a certain commission upon coals, under an agreement between them, and bearing date the 1st of November, 1856, they the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, do hereby severally and respectively guaranty, promise, and agree to and with the said Lee & Jerdein, that they the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, shall and will pay and make good, in the respective portions hereinbefore mentioned, to the said Lee & Jerdein, or their executors, administrators or assigns, all such sum and sums of money as may be due and owing to them at any time or times during the said term of three years from the said James Packer in relation to the said agreement or bills of exchange, not exceeding in the whole the said sum of 300*l.*, such guarantee to be a continuing guarantee, and to be made good at any time by the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, for any balance or amount due to the said Lee & Jerdein in respect of the said agreement between the said James Packer and the said Lee & Jerdein during the said term of three years: And it is hereby declared by the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, that giving time to the said James Packer by the said Lee & Jerdein for the payment of any account \*or balances at any [\*485 time shall not invalidate this guarantee, but that they shall at all times have it in their full power and discretion so to do, or to make any compromise or arrangement that they might deem beneficial with the said James Packer; and that they the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, their executors or administrators, shall remain liable to make good any balance or sum remaining due from the said James Packer to the said Lee & Jerdein, notwithstanding such time so given or such compromise or arrangement as aforesaid; and that further, as between them the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, and the said Lee & Jerdein, any account stated between them and the said James Packer or the account-books of the latter used by them in their regular course of business, shall be taken as conclusive evidence against the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, their heirs, executors, or administrators, either at law or equity, of the amount of the balance or balances due to them on the

said agreement by the said James Packer: And it is further agreed and declared by and between the said parties hereto, that this agreement is to be taken and considered as supplemental and in addition to an agreement bearing date the 1st of November, 1856, made between Sarah Tinson of the one part, and the said Lee & Jerdein of the other part. In witness," &c.

8. The agreement between Sarah Tinson and Lee & Jerdein was as follows:—

"An agreement made this 1st day of November, 1856, between \*486] Sarah Tinson, of, &c., widow, of the one part, \*and Messrs. Lee & Jerdein, of, &c., coal-merchants, of the other part: Whereas the said Sarah Tinson has a son named James Packer, who is a salesman of coals upon commission for the said Messrs. Lee & Jerdein, he the said James Packer giving bills of exchange to the said Lee & Jerdein for all such coals as may be delivered to his order, such bills being floating bills, to be settled for and paid up at the expiration of the current months during which such bills are respectively running: And whereas the said Lee & Jerdein, when they made the arrangement as to such sale by commission and current bills as aforesaid with the said James Packer, stipulated (among other things) that the said Sarah Tinson should give them a floating and continuing guarantee on behalf of the said James Packer to secure to them the said Lee & Jerdein the amount of any balance which might at any time or times be due to them the said Lee & Jerdein from the said James Packer upon any such coal-account on bills, to the amount of 300*l.*; and, in order to induce the said Lee & Jerdein to effect the said arrangement with the said James Packer, the said Sarah Tinson agreed to enter into this agreement for guarantee, in manner hereinafter appearing: Now, this agreement witnesseth, that, in consideration of the said Lee & Jerdein agreeing to allow the said James Packer a certain commission upon coals under an agreement between them and bearing even date herewith, she the said Sarah Tinson doth hereby guaranty, promise, and agree to and with the said Lee & Jerdein that she the said Sarah Tinson shall and will pay and make good to the said Lee & Jerdein, or their executors, administrators, or assigns, all such sum and sums of money as may be due and owing to them at any time or times from the said James Packer in relation to \*487] the said agreement or bills of exchange, not exceeding in \*the whole the sum of 300*l.*, such guarantee to be a continuing guarantee, and to be made good at any time by the said Sarah Tinson for any balance or amount due to the said Lee & Jerdein in respect of the said annexed agreement between the said James Packer and the said Lee & Jerdein: And it is hereby declared by the said Sarah Tinson that giving time to the said James Packer by the said Lee & Jerdein for the payment of any account or balances at any time shall not invalidate this guarantee, but that they shall at all times have it in their full power and discretion so to do, or to make any compromise or arrangement that they might deem beneficial with the said James Packer, and that she the said Sarah Tinson, her executors or administrators, should remain liable to make good any balance or sum remaining due from the said James Packer to the said Lee & Jerdein, notwithstanding such time so given or such compro-

mise or arrangement as aforesaid; and further, that, as between her the said Sarah Tinson and the said Lee & Jerdein, any account stated between them and the said James Packer, or the account-books of the latter used by them in their regular course of business, shall be taken as conclusive evidence against the said Sarah Tinson, her executors or administrators, either at law or in equity, of the amount of the balance or balances due to them on the said agreement by the said James Packer. In witness," &c.

4. The agreement between James Packer and Lee & Jerdein was as follows:—

"Memorandum of agreement made the 1st day of November, 1856, between Messrs. Lee & Jerdein, of, &c., coal-merchants, of the one part, and James Packer, of, &c., agent, of the other part: Whereas, the said James Packer is an agent for the sale of coals for Messrs. Lee & Jerdein, and it has been agreed that he \*shall continue [\*488 as such agent, upon the following terms, to which they the said Messrs. Lee & Jerdein have consented, viz., that the said James Packer shall obtain customers for the said Lee & Jerdein, and have coals delivered to his order, for which the said James Packer shall receive at and after the rate of 7*l.* 10*s.* upon every 100*l.* worth of coals so delivered, except when the price of the said coals shall be 28*s.* and then that the commission of the said James Packer shall be at the rate of 10*l.* for every 100*l.* worth of coals so sold or delivered to his order; and, in consideration thereof, that he the said James Packer shall give bills of exchange to the said Lee & Jerdein as security for the amounts in value of the coals so to be delivered, the intention being that the said James Packer shall make himself personally responsible for the payment of such amounts to the said Lee & Jerdein; that the customers so introduced by the said James Packer shall be deemed the customers of Messrs. Lee & Jerdein, and entered as such in their books, and all bills and accounts shall be sent in to them as such, although the said James Packer shall be entitled to the said commission upon the amounts of their respective accounts; that all moneys received by the said James Packer from any of such customers shall be so received by him as their agent, and paid over and accounted for by him within six days after the receipt thereof by him; that such amounts so accounted for shall from time to time be taken off or credited upon the said floating bills so to be given from time to time by the said James Packer as aforesaid: Now, this agreement witnesseth, that, in consideration of the said commission of 7*l.* 10*s.* and 10*l.* per cent. as aforesaid, the said James Packer hereby promises and agrees to and with the said Messrs. Lee & Jerdein, that he the said James Packer will duly observe and perform all the \*foregoing agreements and [\*489 stipulations; and, further, for the like consideration, that he will not during the continuance of this agreement sell or cause to be sold coals on his own private account or otherwise, or give instructions to any other person whereby any other party may effect a sale or sales of coal, under a penalty of 50*l.* for every such sale or introduction; and, lastly, it is hereby agreed by and between the said parties hereto, that this agreement may be terminated by one month's notice on either side, when all matters of account shall be settled up between them the said Messrs. Lee & Jerdein and James Packer. In witness," &c.



5. The plaintiffs declared in this action on the agreement A.; and the defendant, amongst other pleas, pleaded that the supposed agreement and promise was obtained from him by the plaintiffs and the said John J. Jerdein by the fraud of the plaintiffs and the said John J. Jerdein, and by their fraudulent and undue concealment of material facts within their knowledge respecting the said James Packer material to be made known to the defendant before he entered into the said agreement.

6. In the lifetime of the said John J. Jerdein, and within the said term of three years referred to in the said agreement, and at the time of action brought, there was due and payable and owing in relation to and in respect of the said agreement between Packer and Lee & Jerdein from the said James Packer to the plaintiffs and the said John J. Jerdein, a larger sum of money than 300*l.*, such sum being due and payable as aforesaid in respect of the said coal-account, which sum of money has not been paid to the plaintiffs and the said John J. Jerdein or either of them.

7. The action is brought for the recovery of the sum \*of  
\*490] 100*l.*, being the defendant's proportion of the said sum of 300*l.*

8. At the time the agreement between the defendant and others and Lee & Jerdein was entered into, the plaintiffs and John J. Jerdein had supplied coals under the agreement between Packer and Lee & Jerdein, and a balance to the extent of 1332*l.* was then due in respect thereof, which had not been paid to the plaintiffs and John J. Jerdein in accordance with the terms of such agreement; and the terms of the original agreement between the plaintiffs and John J. Jerdein and Packer had not been carried out, Packer not having for a very considerable term settled for and paid up his floating bills at the expiration of the current months, as stipulated by such agreement: but there was no evidence to show that the plaintiffs and John J. Jerdein were aware, at the time the agreement declared on was entered into, that Packer had actually received such money from the customers for the coals.

In October, 1861, Mr. John Jerdein, one of the plaintiffs, told Packer the plaintiffs wanted further security, and without it could not continue him in their employment.

9. The plaintiffs and John J. Jerdein had no communication with and never saw the defendant before the agreement declared on was entered into, and did not communicate anything to him respecting the said coals so supplied as aforesaid under the agreement between them and Packer before the agreement declared on was entered into, or the fact that they were not paid, or that the terms of the original agreement had been departed from. They left it to Packer to get parties to consent to become sureties. Packer gave to the plaintiffs the names of the parties who had so consented. The plaintiffs then caused  
\*491] the agreement to be prepared, and sent the draft agreement \*to Packer to show to the parties; and in a week he returned it to the plaintiffs, stating that he had shown it, and that they would sign. They, the plaintiffs, then sent round the agreement by a collector, for the purpose of getting the defendant's signature thereto; and the plaintiff John Jerdein swore at the trial that he did not authorize such collector to answer any questions. On behalf of the plaintiffs, objection was made at the trial to any evidence of the

inquiries made of such collector by the defendant; and such evidence was rejected accordingly.

10. The defendant did not know, when he entered into the agreement declared on, of the said supply of the said coals, or that they were not paid for, or that the stipulations of the agreement between the plaintiffs and Packer had not been carried out.

It appeared at the trial, that between the 3d of October, 1861, and the month of July, 1862, coals had been supplied by the plaintiffs to Packer's customers under the agreement, though the amount did not appear; and that the balance due from Packer had been reduced from 1332*l.* to 1270*l.*

11. Counsel for the plaintiffs at the said trial submitted to the learned judge that there was no evidence to go to the jury in support of the plea of fraud; but he ruled that there was.

12. The jury found a verdict for the defendant on the plea of fraud.

13. On the 13th of January, 1863, the Court of Common Pleas, at the instance of the plaintiffs, granted a rule to show cause why such verdict should not be set aside, and instead thereof a verdict entered for the plaintiffs for 100*l.*, pursuant to leave reserved, on the ground that there was no evidence to go to the jury in support of the said plea.

14. This rule the Court of Common Pleas on the \*15th of April, 1863, discharged. The judgment of the court below [\*492 will be found reported in the 14 C. B. N. S. 886 (E. C. L. B. vol. 108).

The question for the opinion of the court of error was, whether or not there was any evidence to go to the jury to support the defendant's plea of fraud. If there was, the verdict for the defendant was to stand: if there was not, the verdict was to be entered for the plaintiffs, for 100*l.*

The case was argued on the 18th of June, before Pollock, C. B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., and Shee, J.

*The Solicitor-General* (with whom was *Prentice*), on behalf of the appellants (the plaintiffs below), contended,—that there was no evidence to go to the jury to support the defendant's plea of fraud,—that there was no duty imposed upon the plaintiffs to inform the defendant of the state of the accounts between them and Packer at the time the agreement on which the action was brought was entered into,—and that there was no evidence of any fraudulent concealment on the part of the plaintiffs.

*O'Malley*, Q. C. (with whom was *Sir G. Honyman*), for the respondents (the defendants below), submitted,—that there was evidence to go to the jury in support of the plea of fraud,—and that the facts stated in the case showed an active misleading of the defendant by the plaintiffs, and a fraudulent concealment by them of material facts.

*Cur. adv. vult.*

The arguments of counsel and the authorities they referred to will be found fully stated and commented upon in the judgments of the several judges, which, \*the court not being unanimous, were [\*493 delivered seriatim, as follows:—

SHEE, J.—The question for our decision is, whether, on the facts before us, as stated in the case and in the agreements which are to be

taken as part of it, there was any evidence for the jury in support of the defendant's plea, that the supposed agreement and promise were obtained from him by the fraud of the plaintiffs, and by their fraudulent and undue concealment of material facts within their knowledge, respecting James Packer, material to be made known to the defendant before he entered into the agreement.

The facts were as follows:—Under an agreement of the 1st of November, 1856, James Packer had been for five years a commission-agent of the plaintiffs for the sale of coals to be delivered by them to his order, on the terms that he should from time to time give to the plaintiffs his bills for the amount of the coals so delivered, and pay to them within six days of its receipt, all money received by him from customers for such coals, to be taken off and credited upon the bill so to be given by him. And by an agreement of the same date, between the plaintiffs and Sarah Tinson, the mother of Packer, she had become surety to the plaintiffs to the extent of 300*l.* for the due performance by Packer of his agreement. Packer, not having for a very considerable time “carried out his agreement by settling for and paying up his bills at the expiration of the months during which they were current,” had become debtor to the plaintiffs in the sum of 1332*l.*, and Sarah Tinson on her guarantee for him had become their debtor to the extent of 300*l.*, when the plaintiffs informed Packer that they wanted further security, and could not without it continue him in their \*494] employment, and stipulated with him that “the defendant and the other parties sureties with him in the agreement sued upon, should by their several and continuing guarantees give the plaintiffs further security to the extent of 300*l.* against the said James Packer. In pursuance of this stipulation, the plaintiffs caused the agreement sued upon to be prepared. Although, in legal construction, it extends to defaults already made, as well as to defaults which might be in the future made, it gives no intimation in any part of it of an intention that it should operate retroactively, or of any ascertained default on which it could so operate. It is silent on the fact of the breach by Packer of his agreement that he would for the coals delivered to his order give from time to time his acceptances, and take them up at the expiration of the months during which they were current,—on the fact that, by not having done so, he had incurred a debt to the plaintiffs of 1332*l.*, and involved Sarah Tinson in a liability for 300*l.*,—on the fact that the plaintiffs had informed him that he must give them further security or relinquish their employment,—on the fact that the defendant, on his signature of the agreement, would, not contingently only on future defaults, but at once, become liable for 100*l.*: and none of these facts, of which the defendant was entirely ignorant, were communicated to him by the plaintiffs. Nor was any opportunity for inquiry of them, or of those who represented them, afforded to the defendant. The plaintiffs personally had no communication with him, and never saw him: it was left to Packer, whose employment and livelihood as well as the liability of Sarah Tinson were at stake, to obtain the consent of the defendant and of the other sureties, in the best way he could, and as he thought proper; and the collector of the plaintiffs, who was sent round with

the agreement to procure the signatures of the \*defendant and of the other sureties had no authority to answer questions. [\*495]

It is clear, from the case of *The North British Insurance Company v. Lloyd*, 10 Exch. 523,—correcting a dictum of Lord Truro in *Owen v. Homan*, 3 M'N. & G. 378,—that the rule which prevails in assurances upon marine and life risks, that all material circumstances known to the assured must be disclosed by him, and that the non-disclosure of them, though innocent, and not fraudulent, vitiates the contract, does not apply to contracts of guarantee: but, upon a discussion in which the question is, whether there was any evidence to be left to the jury to support a plea, not of non-disclosure merely, but of fraud and fraudulent concealment, of facts material to be made known to the defendant, this singularity of insurance law is surely little better than an intruder. What place can it have in the argument, unless they who put it forward are at liberty to assume the negative of the plea? Whether there was any evidence of fraud and fraudulent concealment, is the subject of inquiry; and there is no definition of guilty, as distinguished from innocent, silence, or of bad faith and fraud in contracts, which the facts in this case do not exactly fit.

The making one state of things appear to those with whom you deal to be the true state of things, while you are acting on the knowledge of a different state of things, (a)—among the oldest definitions of fraud in contracts,—is here exemplified; for, the agreement was prepared by the plaintiffs as a security to them against a defaulter, with whom, on account of his default, except on further security, they had declined to continue their arrangement; and the defaulter is held out by them as their commission-agent, with a five years' character in their service, who had been guaranteeing by his own bills during that time the \*customers introduced by him, under the protection of a prearranged system of short reckonings, settlements, [\*496] and payments, against all temptation to dishonesty, irregularity, or rash dealing.

Sarah Tinson, whom presumably he would be reluctant to imperil, is held out as a person who was willing after five years' experience of the working of her son's commission-agency, to continue liable to the same extent in amount and time with the defendant and the other proposed sureties; whereas, her guarantee, to which theirs is described as "supplemental and additional," was exhausted, the first and immediate office of their guarantee being, to make hers good should she fail in doing so,—they, should she discharge it, continuing liable to the extent of 300*l.* for the balance remaining due by Packer to the plaintiffs, and any future addition to it.

The only hint in the agreement sued upon, of the real state of things between the plaintiffs and Packer, is to be found in the recital that, "*in order to induce the said Lee & Jerdein to continue the said arrangement with the said James Packer, the said sureties had agreed,*" &c.; the effect of which recital was for the jury, and which, when read with the context, was more likely to lead the proposed sureties to the inference that the existing security had by reason of the in-

(a) Aliud simulatum, aliud actum (De Officiis, l. 2, c. 44).

crease of Packer's transactions on account of Lee & Jerdein become inadequate, than that it was already forfeited.

"The guilt of fraud," says the Digest, "is not in him only who, for the purpose of deceiving, uses obscure language, but in him who insidiously, and without appearing to do so, dissembles what he thinks."<sup>(a)</sup>

\*497] It is difficult to conceive language more obscure \*and better calculated to mislead, or dissimulation more insidious, than in this agreement. Who would imagine that a recital "that James Packer had for some time past been a salesman of coals on commission for the said Lee & Jerdein, he the said James Packer giving bills of exchange to them for all such coals as may be delivered to his order, such bills being floating bills, to be settled for and paid up at the expiration of the current months during which such bills are respectively running," was, if true in any sense, true only in the loose sense that he had contracted five years before to give bills from time to time for such coals as might be delivered to his order, without any stipulation as to their being settled for and paid up at the expiration of the current months during which they were running; or that the course of dealing thus described, if it ever existed, had not, as the case expressly states, been observed by Packer for a very considerable time?

What plain man, bargaining with one whom he thought honest, and did not care to insult, could reasonably be expected to inquire whether the words "should give to Lee & Jerdein a floating and continuing guarantee for the term of three years," might not mean or be intended to mean, that he was to be liable before his signature to the agreement was dry, absolutely and inevitably, to the extent of 100*l.*? or whether the words in the operative part of the agreement, "do hereby guaranty, promise, and agree that they shall and will pay and make good all such sum and sums of money as may be due to Lee & Jerdein at any time during the said term of three years," might not be intended to mean,—do hereby guaranty, promise, and agree that they shall and will pay and make good to the extent of 300*l.* a debt of four times that amount now due, and all further debts, not exceeding that amount, which may become due during the term of three years?

\*498] \*"To be silent is one thing, concealment is another. You may be silent respecting facts within your knowledge, without being guilty of concealment: you are guilty of it when the motive of your silence is a wish that others, for your advantage, should be ignorant of that which you know, and which it is for their interest that they should know." Such is the description or definition of undue concealment, in the treatise *De Officiis*, l. 3, 12, 13.<sup>(b)</sup>

These definitions and maxims, though cited in all the books on the

(a) "*Dolus malus non tantum in eo est, qui fallendi causâ obscure loquitur; sed etiam qui insidiosè, obscure, dissimulat.*" Dig. l. 43, § 2, *De Dolo Malo*.

(b) "*Aliud est celare, aliud tacere: neque enim id est celare quicquid reticeas; sed cum quod tu scias, ignorare id emolumenti tui causâ, velis eos, quorum intersit, id scire. Hoc autem celandi genus, quale sit et cuius hominis, quis non videt? Certè non apertè, non simpliciter, non ingenuè, non iustè, non viri boni; versutè, potius, obscure, astutè, fallaciter, malitiosè, callidè, veteratoris, vafri; hæc tot et alia plura, nonne inutile est subire nomina?*"

contract of insurance, are of much older date than any certain trace of that contract, and not more applicable to it than to the contract of guarantee.

Is there not in this agreement a studied effort to conceal the truth from those who were interested in knowing it, and whom the plaintiffs and Packer wanted not to know it?

Under this impression, I should on the argument of this case, had it not been for the dissent of my Lord Chief Baron and of most of my learned Brothers, have arrived at a confident opinion that there was not some evidence only, but cogent evidence, of such a suppression of the truth, by a partial, inaccurate, and subdulous setting forth by the plaintiffs in the agreement, of facts within their knowledge, material for the proposed sureties to be informed of, as, along with the non-communication of other facts material for them to know, amounted to a misrepresentation to the \*proposed sureties, that they were [\*499 asked to come under none but the mere ordinary liability of sureties,—a contingent liability; and that Packer, during his five years' agency, had proved himself to be a man worthy of trust and confidence, a satisfactory guarantor of others, and himself the safe subject of a guarantee.

But it was urged on the part of the plaintiffs, and with the apparent assent of some of my Brothers, that we are concluded on this point by authority, and that, if the cases which have been cited to us had been more maturely considered in the court below, its judgment would have been different. I do not think so. The two cases in the House of Lords, and the case in the Court of Exchequer, appear to me to have been rightly understood by the Chief Justice at nisi prius, and by the Court of Common Pleas, and to be in favour of the defendant. There is not a word in them tending to weaken the principle, that an undue and fraudulent concealment of matters material to be known by the guarantor, vitiates the contract which is tainted by it.

The case of *Railton v. Matthews*, 10 Clark & Fin. 935, decided, that, upon an issue "whether the pursuer was induced to subscribe the bond by undue concealment or deception on the part of the defenders,"—as explained by the summons of reduction of suretyship to mean, "whether, when the defenders accepted and took possession of the said bond, they fraudulently suppressed and concealed the said whole facts and circumstances regarding the conduct and irregularities of the debtor,"—it was a misdirection to tell the jury that "such concealment, to vitiate the bond, must be wilful and intentional on the part of the person obtaining it, and with a view to an advantage to himself."

Undue concealment, though not wilful and intentional, and with a view to the advantage of the person \*taking a guarantee, [\*500 being thus held sufficient to vitiate it, the case is strongly in favour of the defendant; for, there was in this case, as it seems to me, evidence that the non-communication to him by the plaintiffs was not merely undue, but wilful and intentional: and it was for their immediate advantage, and, as they knew, and knew that the defendant did not know, for his immediate disadvantage, if an underhand dealing of guarantee by the party taking it can ever be so.

But *Railton v. Matthews* is said to have been qualified by the later case of *Hamilton v. Watson*, 12 Clark & Fin. 109. Quite otherwise, as it appears to me. In *Hamilton v. Watson*,—the true grounds of the decision of which are to be found in the judgment of Lord Cottenham, and in what fell from him in the course of the argument, rather than in the judgment of Lord Campbell,—a cash credit on the guarantee of sureties had been granted to a man already in debt to the bankers who granted it, and the debt, which had not been mentioned to the sureties, was discharged by a check, which but for the new cash credit the debtor would not have been in a position to draw. There was no allegation, as observed by Lord Cottenham, of fraud or misrepresentation, or of any secret agreement as to the way in which the cash credit should be applied; but it was pressed upon the House, at the Bar, that it was the duty of bankers taking a guarantee *for a cash credit*, to inform the party giving the guarantee of *every* circumstance in the previous dealings of the party guaranteed, which might influence the consideration whether the guarantee should be given or refused. Lord Cottenham and Lord Campbell combat this contention, in their judgments. The latter suggests, as a criterion of innocent silence on the part of a creditor taking a suretyship bond, whether the fact not disclosed be one the existence of which might \*501] naturally be expected by the surety,—as, the indebtedness to his bankers of a person asking friends to be sureties for him to those bankers in a new cash credit would be. Their decision is, that, where there is no fraudulent concealment, it is not necessary to the validity of a *cash-credit surety bond* that all the circumstances of the dealings between the debtor and the creditor taking it should be *voluntarily* disclosed by the latter to the party giving it.

There is a wide difference as respects what might naturally be expected to be the actual state of the account of one man with another, between the case of a suretyship for a man requiring and applying for a cash-credit to bankers with whom he had had previous dealings, and whose business it is to lend capital to penniless persons on the security of sureties, and the case of a suretyship for a surety of others,—a surety between whom as such and his employers short reckonings, as the defendant was led to suppose, had for five years been observed as a rule. But it is unnecessary to dwell upon the distinction; for, in *Hamilton v. Watson*, neither fraud nor fraudulent concealment was charged; whereas, here, they *are* charged, and the only question is, whether there was any evidence to be left to the jury of them.

The case of *The North British Insurance Company v. Lloyd*, 10 Exch. 523, would not probably have been cited, had it not been for the distinction re-established in it by my Lord Chief Baron between the contracts of insurance and of guarantee. The fact not disclosed in that case was considered by the jury not to have been one material for the surety to have been informed of: and the court concurred in their decision upon that point.

It is stated in the case, that there was "*no evidence to show that the plaintiffs were aware at the time the agreement of the 3d of October, 1861, was entered \*into, that Packer had actually received pay-*" \*502] *ment from the customers for the coals delivered to his order.*"

This seems to imply that Parker *had* received such payment: and, though we are not at liberty to infer the plaintiffs' knowledge of it, we are at liberty to infer, that, while contemplating the obtaining of the suretyship of the defendant and of the other sureties, the plaintiffs were deliberately and grossly negligent of a duty which for the sake of the proposed sureties it was incumbent upon them to discharge,—the duty of ascertaining the cause of Packer's default; whether he had received payment for the coals delivered to his order, and, if so, whether the money which he ought to have paid over to the plaintiffs within six days of its receipt, had been applied by him to other uses. "*Dissoluta negligentia prope dolum est:*" Dig. l. xvii., t. 1, § 29.

If Packer with the plaintiffs' authority had actually received payment for the coals delivered to his order, the observation of one of my learned Brothers in the course of the argument, that the customers, notwithstanding Packer's intervention, were, as well as he, and they primarily, responsible to the plaintiffs, would have less weight than it might otherwise be entitled to, though this double liability of Packer and of the customers to the plaintiffs, could in no case, as it appears to me, countervail the inherent ugliness of the transaction.

Upon the whole, I am of opinion that the judgment of the Court of Common Pleas should be affirmed.

BLACKBURN, J.—I am of opinion that in this case the decision of the court below should be affirmed.

The question is, whether, under the circumstances stated in the case, there was evidence to go to the jury in support of the averment of fraud; for, I think that the averments of undue concealment carry the case no \*further, and that, unless actual fraud was [\*503 proved, the substance of the issue was not proved.

It was decided in *The North British Insurance Company v. Lloyd*, 10 Exch. 533, that the rule that all material circumstances known to the assured must be disclosed, is peculiar to contracts of insurance, and that it does not extend to contracts of guarantee.

I concur in this, which I think founded upon principle as well as authority. It was pointed out by the Chief Baron in the argument in the present case, that a surety is in general a friend of the principal debtor, acting at his request, and not at that of the creditor; and, in ordinary cases, it may be assumed that the surety obtains from the principal all the information which he requires: and I think that great practical mischief would ensue if the creditor were by law required to disclose everything material known to him, as in a case of insurance. If it were so, no creditor could rely upon a contract of guarantee, unless he communicated to the proposed sureties everything relating to his dealings with the principal, to an extent which would in the ordinary course of things be so vexatious and annoying to the principal and his friends, the intended sureties, that such a rule of law would practically prohibit the obtaining of contracts of suretyship in matters of business. This is well pointed out by Lord Campbell in his judgment in *Hamilton v. Watson*, 12 Clark & Fin. 118. But I think, both on authority and on principle, that, when the creditor describes to the proposed sureties the transaction proposed



to be guaranteed (as in general a creditor does), that description amounts to a representation, or at least is evidence of a representation, that there is nothing in the transaction that might not naturally be expected to take place between the parties to a transaction such as that described. And, if a representation to this effect is made to the \*504] intended surety by one who knows that \*there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he makes the representation, and that, if it were known to him, he would not enter into the contract of suretyship, I think it is evidence of a fraudulent representation on his part.

I think that it appears in *Hamilton v. Watson* that such was the opinion of Lord Campbell; and I think that on this principle are founded the judgments of Lord Eldon in *Smith v. The Bank of Scotland*, 1 Dow 278, and of the Court of King's Bench in *Pidcock v. Bishop*, 3 B. & C. 605 (E. C. L. R. vol. 10), 5 D. & R. 505.

In the present case, the plaintiffs had no personal communication with the defendant, the surety: and, when they sent the agreement to him for execution, they sent it by an agent who had no authority from the plaintiffs to make any statement whatever, or to do anything more than obtain the defendant's signature to the agreement thus sent.

The argument for the plaintiffs before us was, in substance, that, under such circumstances, though there might be a concealment or non-disclosure of material facts, there was not and could not be any misrepresentation on the plaintiffs' part; and that, without it, there could be no fraud: and, during the argument, I was inclined to be of that opinion; but, on consideration, I have come to the conclusion that in this case there was evidence of intentional deceit, by a false representation of the kind I have above referred to, amounting to actual fraud.

The written agreement which before it was executed the plaintiffs sent to the defendant, recites that Packer, the principal, had been for some time salesman to the plaintiffs on terms by which he was, in substance, to be a del credere agent, settling and paying for what he \*505] had sold monthly, and that they had required from \*him security to induce them to continue him in the employment, and stipulated that the defendant and others should give them a floating and continuing guarantee for the term of three years from the date thereof, to secure the amount of any balance which might at any time be due to them on the coal account.

I think this was evidence of, or rather, if not qualified by other matters, amounted to a representation that there was nothing in the transaction between the plaintiffs and Packer which might not in the ordinary course of affairs be expected to have taken place between them as parties to such a transaction.

It is stated in the case (par. 8), that, at the time when this agreement was sent to the defendant, a balance of 1832*l.* was actually then due from Packer; he not having for a *very considerable time* settled for and paid up at the expiration of the current months, as stipulated by the agreement. It is, however (in favour of the plaintiffs), further stated that there was no evidence that the plaintiffs were aware that Packer had actually received the money from the customers.

Now, whether the handing the agreement by the plaintiffs to the defendant amounted to an inaccurate representation or not, depends, as I think, on the question whether in such a transaction as that described in the agreement, it might or might not naturally be expected that the masters might have allowed a balance of this extent to accumulate, and might have allowed the account to stand over unsettled for so long a time. In *Hamilton v. Watson*, 12 Clark & Fin. 118, the transaction was a security for a banker's cash account; and the decision of the House of Lords was, that, in such a case, it might be so naturally expected that the proposed principal had already overdrawn his account, that there was no evidence of a representation that he had not.

\*In *Smith v. The Bank of Scotland*, 1 Dow 272, where the security was given for the good behaviour of a bank agent, it was held that an allegation that the bank knew that the principal had misconducted himself in his office, and that this fact was concealed from the sureties, ought to have been admitted to proof in the court below. I think the effect of Lord Eldon's judgment in that case is, that it was so little to be expected that a bank would continue in their service an agent who had already by breach of trust run into their debt, that the application for security amounted, as he says, to "holding him forth to the sureties as a trustworthy person:" 1 Dow 292. [\*506]

I think that it must in every case depend upon the nature of the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist; and that must generally be a question of fact proper for a jury. If in this case the amount of the balance already due had been small, or the period during which the accounts were left unsettled short, there would in my opinion have been such a mere scintilla of evidence as would not have warranted the jury in finding the verdict of fraud; and the judge would have been justified in withdrawing the question from their consideration. But, as it is, the amount of the balance already due being, relatively to the amount of the security, so large, and the period during which no settlement had taken place being so considerable, I think the judge could not have withdrawn the case from the consideration of the jury, who might well come to the conclusion that the sending of the agreement in these terms amounted to an inaccurate representation. This would not be enough to support the verdict on the plea of fraud, unless it was further established that the plaintiffs made the inaccurate representation, intending to deceive the defendant, \*and induce him to enter into the contract, in the belief that what was represented did exist, whilst the plaintiffs knew it did not exist. But of that also I think there was sufficient evidence. [\*507]

The improbability that any one could suppose that sureties would have entered into such an agreement if they had known the truth, is so great that the jury might well think that the plaintiffs knew that the defendant was in ignorance of it: and, if the jury so thought, they might from that alone draw the inference that the representation was fraudulently intended to deceive. This is strengthened by the facts that the plaintiffs apparently avoided having any personal communication with the proposed sureties, and sent the agreement for

execution by an agent who had no authority from them to make any statements; from which the jury might perhaps draw the further inference that the plaintiffs took pains to avoid the risk of the sureties asking questions and being undeceived.

It is not essential, to constitute fraud, that there should be any misleading by *express words*; it is sufficient if it appears that the plaintiffs knowingly assisted in inducing the defendant to enter into the contract, by leading him to believe that which the plaintiffs knew to be false, the plaintiffs knowing, that, if he had not been thus misled, he would not have entered into the contract.

For the reasons above given, I think there was in this case evidence to support the verdict; and consequently the judgment in my opinion should be affirmed.

BRAMWELL, B.—I think this judgment should be reversed. It is clear that nothing turns on the defendant's being a surety. The question raised, and properly raised, by the pleadings, is, was the defendant's \*508] engagement obtained by the plaintiffs' fraud,—actual moral fraud? The question argued before us was, was there evidence of such fraud? The court below says there was, but unfortunately does not point out in what it consisted. With very great respect, I *see* none; and I think it can be shown there is none. To constitute fraud, there must be,—first, the assertion of something false; which is not the case here,—or, secondly, the suppression of something true, where there is a duty or profession of stating everything material; and here there is no such duty,—or, thirdly, what perhaps is included in one of the foregoing, a suggestion of falsity, by statement of some facts, and suppression of others which would qualify those stated; as, if one should say A. was seised and died, B. was eldest son, entered, and enjoyed, and suppress that A. made a will and gave B. a life-estate. To my mind, there is nothing of that here. Perhaps, but most improbably, the defendant inferred or guessed that no arrears were due to the plaintiffs. I should not have so concluded. On the contrary, I should have concluded that there was some change in the circumstances of the parties, which induced the plaintiffs to require further security. But, supposing the defendant's was a right conclusion, and supposing that, if he could not inform himself further, he was justified in acting on it, I say that here he was not so justified, because he might, if he cared to know them, have informed himself of the actual facts from the plaintiffs, or, if they refused to tell him, he might have refused to be surety. I think a man has great right to complain of another who charges him with fraud because he the accuser has not taken the trouble to make a few inquiries. I really can see no evidence of any fraud, of anything dishonest in this case. There is \*509] nothing inconsistent with the plaintiffs' honesty. But \*when the facts are equally consistent with a conclusion one way or the other, they are no evidence either way. I think the opinion that there was *evidence* of fraud is founded on a misapprehension. Packer was not a *dishonest* defaulter, to the knowledge of the plaintiffs. He was ~~known~~ to them to a large amount, every shilling of which might have ~~been~~ due from solvent debtors. The plaintiffs continued him a long time after in their service. They sent the agreement of suretyship to the defendant, and left it with him several days for him to make such

inquiries as he thought fit. He makes none. Suppose he had asked, and been told the truth, could anybody say there had been any fraud or attempt at fraud? Suppose he had employed an attorney, would any one say there was an attempt to deceive the attorney? The notion of fraud arises from the defendant being likely to behave foolishly, to make no inquiry, making none, and being a surety. I think this very mischievous; that a man should have his carelessness rewarded by liberty to call out fraud! Very mischievous, that people should be charged with fraud by careless persons simply on account of their carelessness. No one is safe, if this is allowed. No one can ever know that he has sufficiently guarded against the rash conclusions and folly of those he deals with, and saved himself from the uncharitable and foolish conclusions a jury may be disposed to come to in favour of a surety.

CROMPTON, J.—The judgment I am about to read is one in which my Brother Channell concurs.

The question in this case is, whether the Court of Common Pleas were wrong in holding that there was some evidence of fraud to go to the jury. It is quite clear that the mere non-disclosure of material facts will not operate so as to avoid a contract of the nature [\*510 of the one in this case; such defence being, as pointed out in the case of *The North British Insurance Company v. Lloyd*, 10 Exch. 535, peculiar to the contract of insurance. Such non-communication avoids the contract of insurance without fraud, and however innocent the conduct of the party may be, on grounds peculiar to the contract of insurance, and not applicable to the case of a guarantee.

I cannot say that the court below were wrong in holding that there was some evidence of fraud to go to the jury in this case, or that the learned judge who tried the cause could properly have withdrawn it from the jury.

To constitute a fraudulent misrepresentation, it need not be made in terms expressly stating the existing of some untrue fact: but, if it be made by one party in such terms as would naturally lead the other party to suppose the existence of such state of facts, and if such statement be so made designedly and fraudulently, it is as much a fraudulent misrepresentation as if the statement of the untrue facts were made in express terms.

It seems to me that the defendant in the present case would be naturally led by the guarantee, and the original agreement with Packer annexed thereto, and the reference to the agreement with Mrs. Tinson referred to in the guarantee, which is said to be supplemental to that agreement, to suppose that a different state of things existed from the real state of things known to the plaintiffs. It was known to the plaintiffs that Packer, the principal, had not carried out his original agreement with them, and that there was a large sum due from him on his floating bills. By his agreement with them, the moneys to be received by him from the customers, from time to time, were to be paid over and accounted for within six days, and were [\*511 to be applied to the floating bills. Surely, on perusing such documents as were sent, the proposed sureties would be led to suppose that the moneys to be received from time to time would be applicable in the first instance to the bills to be given from time

to time, and not to a large deficit on the old bills. In truth, none of the money to be received would be applicable to the new transactions till the large balance was wiped off: and it is very unlikely that the surety would have joined in the new guarantee, had he been aware of the existence of the old debt.

I think also that the new sureties would naturally be led to suppose from the draft guarantee, and from its being stated that their engagement was to be supplemental and in addition to Mrs. Tinson's, that her guarantee was practically applicable to the new dealings; whereas, whether the defendant's suretyship was applicable retrospectively or not, hers would really be in effect absorbed by the large balance.

I think, therefore, that there was evidence that the defendant was led by the sending of the documents in question to the belief in an untrue state of facts, where the knowledge of the true state of facts would have prevented him from joining in the contract of suretyship.

It was said, indeed, that the plaintiffs' sending the documents in this shape may have been without any intentional fraud on their part, and that they may merely have got the documents drawn by their professional advisers in a proper state, and forwarded them without moral fraud. This seems, however, to me to be a question which the jury were to determine: and it is not necessary for me to consider whether in their place I should have found the fraud. We are only to decide whether there was evidence to go to the jury. The sending \*512] the documents to the defendant, \*and leaving them with him, the largeness of the sum in arrear, the improbability that the defendant would have become surety if he had known the real facts of the case, on the one hand, and, on the other hand, the circumstance of the plaintiffs not having seen the proposed sureties, and merely having sent the papers to them, and the other circumstances referred to in the argument, were, as it seems to me, matters entirely for the jury: and I cannot say that the Court of Common Pleas were wrong in holding that there was some evidence for their consideration.

I therefore think that the judgment of the court below should be affirmed.

POLLOCK, C. B.—The question in this case is simply whether there was any evidence of fraud on the part of the plaintiffs, such as to prevent them from recovering from the surety the amount guaranteed.

The facts are very short and plain. James Packer acted as commission-agent for the plaintiffs, selling goods which they supplied, and receiving payment for them, charging a commission upon each transaction. He gave bills to the plaintiffs, which were to be paid at stipulated times. As this involved considerable responsibility on the part of Packer, he originally gave security to the plaintiffs, by his mother, Sarah Tinson, to the amount of 300*l*. The business went on, and his accounts became in arrear to some extent: upon which the plaintiffs told him they could not allow his employment to go on, unless he found further security; whereupon he undertook to do so, and procured the defendant and others to undertake to sign the agreement on which this action was brought. This was a further security for 300*l*. more, *expressed* to be supplemental and in addition to the \*513] former: so that the new sureties were to be liable for whatever \*Sarah Tinson was to be liable to; and this was *distinct notice*

*that the suretyship was to be retrospective.* The plaintiffs never had any communication with the defendant, and never interfered in any way, beyond sending the agreement to be signed, which they had been told by Packer the defendant had approved of, and which was true.

It is said there was in this matter *concealment* or *misrepresentation*. In fact there was *no representation at all*; and therefore there could not be *misrepresentation*: and, as to concealment, the plaintiffs never undertook to make any disclosure, and in my judgment were not under any legal or moral obligation to make any disclosure, under the circumstances.

It must be taken that the occupation of Packer was a profitable one, —one in which a prudent man might have recovered himself, though he had fallen into some difficulties. The plaintiffs say to him,—"If you can procure from your relations or friends a further guarantee, we will allow you to continue, notwithstanding the present state of your accounts: but, if you cannot, we will stop now." He undertakes to procure, and does procure, a further guarantee: and the business, therefore, went on. Whether Packer made to his sureties a faithful and true representation of the state of his affairs, is entirely a matter of indifference. If he did, then they have no ground of complaint *at all*; if he did not, it is no fault of the plaintiffs. The defendant has trusted Packer, whom the plaintiffs would trust no longer; and Packer has deceived the defendant. But the plaintiffs never, directly or indirectly, made any communication to the defendant on the subject of the state of the accounts. It was, however, manifest that the plaintiffs required further security, and retrospective security. It was, therefore, the duty rather of the sureties to inquire than of the \*plaintiffs to inform them what was the state of the [\*514 accounts.

In my opinion there is a total absence of any evidence of fraud; and, I should add, no just ground for any suspicion of it. I think the rule ought to be made absolute.

I cannot help adding that I think it is somewhat hard upon the plaintiffs that they should not only lose their money and incur the costs of an expensive litigation, but also be abused into the bargain.

The majority of the court being in favour of the defendant, the judgment of the court below was affirmed.

Judgment affirmed.

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HANS RINGLAND, the younger, by WILLIAM RINGLAND, his Prochein Amy, v. JOSEPH LOWNDES, Clerk of the Burslem Local Board of Health. *June 17.*

Held,—reversing the judgment of the Court of Common Pleas,—that a party who attends before an arbitrator under protest, cross-examines his adversary's witnesses, and calls witnesses on his own behalf, does not thereby preclude himself from afterwards objecting that the arbitrator was proceeding without authority.

THIS was an appeal against a decision of the Court of Common Pleas.

Under the Public Board Act, 11 & 12 Vict. c. 63, where a disputed claim to compensation is to be settled by arbitration, the award is, by s. 124, to be made "within twenty-one days after the

appointment of the arbitrator, or within such such extended time, if any, as shall have been duly appointed by him for that purpose." By s. 125, it is provided, that, in case the arbitrators neglect or refuse to \*515] appoint an umpire \*for *seven days* after being requested so to do by any party, the sessions shall, on the application of such party, appoint an umpire. And by s. 126 it is further provided that the time for making an award under the act shall not be extended beyond the period of three months from the date of the submission or *from the day on which the umpire shall have been appointed*, as the case may be.

In 1856, the plaintiff sustained damage from the construction of works by a local board, and in 1858 made a claim for compensation. He afterwards obtained a rule for a mandamus commanding the board to make compensation. Arbitrators were afterwards (in January, 1864) appointed to assess the amount, under s. 123. These having refused to appoint an umpire, the plaintiff applied to the Easter sessions to appoint one, but failed in consequence of the want of a notice of his intention to make such application. The required notice having been given, a second application was made at the Midsummer sessions, and one Johnson was named as umpire; but, as his consent had not been obtained, no formal appointment was then made. A third application was made at the Michaelmas sessions, and Johnson was on the 14th of October, appointed umpire, and accepted the appointment. On the 13th of November, the umpire (*not having enlarged the time for making his award*) appointed the 29th for entering upon the arbitration. The counsel for the board, being informed of this objection, *protested* against the umpire's going on with the reference, but still attended, cross-examined the plaintiff's witnesses, and called witnesses for the board; and at the close of the business *intimated to the umpire that the board would rely upon their protest, in case the award should be against them*. The umpire made his award in favour of the plaintiff on the 30th of December. In an action upon the award, it \*516] \*was held by the Court of Common Pleas,—consisting of Byles, J., and Keating, J.,—first, that the *appointment* of the umpire in reality took place at the Michaelmas sessions, and was in time, and consequently the award was duly made within three months from the umpire's appointment,—secondly, that, although the umpire had failed to comply with the requirement of the 124th and 126th sections of the act, by enlarging the time for making his award within twenty-one days of his appointment, that defect was cured by the attendance of the board and their taking part in the subsequent proceedings.(a)

The defendant appealed against this decision, and the case was argued at the sittings in error after last Easter Term, before Bramwell, B., Blackburn, J., Channell, B., Mellor, J., Pigott, B., and Shee, J.

*Lush, Q. C.* (with whom was *McMahon*), for the appellant (defendant below).—It may be assumed to be conceded that the appointment of Johnson as umpire took place at the October sessions.(b) But the

(a) See the report, 15 C. B. N. S. 173 (E. C. L. R. vol. 109), where the case is fully set out.

(b) Channell, B., referred to *Holdsworth v. Wilson*, 2 Best & Smith 480 (E. C. L. R. vol. 110), in error 4 Best & Smith 1 (E. C. L. R. vol. 116).

question is, whether the time for making the award was duly enlarged by the umpire; and, if not, whether the objection on that score was waived by the conduct of the parties who represented the local board in attending before the umpire under protest. The 85th section of the Public Health Act, 11 & 12 Vict. c. 63, empowers the local board to make contracts for carrying the act into effect,—in the case of a non-corporate district, as this is,—by writing under their seal and the hands of any five or more of their number: and a contract [\*517] \*which does not comply with this condition cannot be enforced: *Freud v. Dennett*, 4 C. B. N. S. 576 (E. C. L. R. vol. 93). The 123d section, which is the first of the arbitration clauses, enacts, that, “in case of dispute as to the amount of any compensation to be made under the provisions of this act (except where the mode of determining the same is specially provided for), and in case of any matter which by this act is authorized or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party, on the request of the other, shall appoint an arbitrator, to whom the matter shall be referred; and every such appointment when made on the behalf of the local board of health shall (in the case of a non-corporate district) be under their seal and the hands of any five or more of their number, or under the common seal in case of a corporate district, and, on the behalf of any other party, under his hand, or, if such party be a corporation aggregate, under the common seal thereof; and such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same; and, after the making of such appointment, the same shall not be revoked without the consent of both parties, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such matter shall have arisen, and notice in writing by one party who has himself duly appointed an arbitrator to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fail to appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties: and the award of any arbitrator or arbitrators appointed in pursuance of this act shall be binding, final, and conclusive upon \*all persons and to all intents and purposes whatsoever.” The 124th section [\*518] enacts, amongst other things, that, “in case a single arbitrator die or become incapable to act, before the making of his award, or fail to make his award *within twenty-one days after his appointment*, or *within such extended time, if any, as shall have been duly appointed by him for that purpose*, the matters referred to him shall be again referred to arbitration under the provisions of this act, as if no former reference had been made.” The 125th section provides for the appointment of an umpire, and enlargement by him. And the 126th section provides that the time for making the award shall not be extended beyond three months from the date of the submission, or from the day on which the umpire shall have been appointed, as the case may be. The decision of the court below proceeded mainly on the ground that the appearance of the defendant under protest operated as a waiver. [BRAMWELL, B.—We are to assume, that, if he had not appeared, the



umpire would have had no jurisdiction?] Yes. This is not like the waiver of a forfeiture. If the award can be upheld at all, it must be upon the ground that the appearance before the umpire amounted to a new appointment: but, though that argument might avail in the case of an individual, it cannot apply to this board, who could only contract under seal. An individual is bound by his attending before the arbitrator, by reason of such attendance amounting to a new parol submission: but here, the statutory authority once gone, nothing short of a new contract could be binding on the board. [BRAMWELL, B.—What is the meaning of waiver? Is it to be said that the board by attending before the arbitrator as they did, gave him permission to go on for ever and ever? CHANNELL, B.—An irregularity may be waived. But the question is, whether this is not something more than \*519] irregularity.] The \*umpire had no more authority to make this award than if he had been a perfect stranger. In *Davis v. Price*, 6 Law T. N. S. 718, it was held that an objection that arbitrators were exceeding their authority in going into the question of damages, was not waived by the defendant's attending under protest and cross-examining when the question of damages was gone into. The distinction between waiver and new contract is well pointed out in *Russell v. Thornton*, 6 Hurlst. & N. 140. The plaintiff, the agent in London of the foreign owners of a steamship *Butjadingen*, being instructed by them to cause the ship to be insured for a year from the 21st of January, 1857, employed H. & Co., insurance-brokers, to effect the insurance. On the 15th of January, H. & Co. applied to the defendant to become an insurer. On that day the plaintiff received a letter from the captain of the ship, informing him that the vessel had been aground and had received some heavy blows, and had made her way in a sinking state to the port of Carthagena, where she then was. On the same day, the plaintiff communicated this letter to H. & Co., but they did not communicate it to the defendant. On the 16th, the defendant agreed to become an insurer for 3000*l.*, and debited H. & Co. with the premiums. On the 22d, the plaintiff sent an extract from the captain's letter to Lloyds. The defendant, who was then for the first time informed of the fact that the ship had been ashore, wrote to H. & Co. as follows,—“Understanding that the ship *Butjadingen* has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired.” This letter was not answered by H. & Co. The debit of H. & Co. in the books of the defendant remained until after the loss. On the 2d of April, the vessel was surveyed, and reported to be perfectly tight and in a condition to undertake a voyage of any description. After several \*intermediate voyages, she was totally lost on the 9th of \*520] October, 1857. It was held by the Exchequer Chamber (affirming the judgment of the Court of Exchequer),—first, that there was no waiver of the objection to the policy by reason of the concealment of the information that the vessel had been ashore,—secondly, that there was no evidence of a new contract founded on the defendant's letter of the 22d of January. Even if this had been an arbitration between two ordinary individuals, the defendant's attendance *under protest* would be no waiver. Appearing under

protest cannot give *jurisdiction*: *Holt v. Meddowcroft*, 4 M. & Selw. 487.

*Hayes*, Serjt. (with whom was *Beasley*), for the respondent.—[BLACKBURN, J.—Persuade us, if you can, that an award made under such circumstances would have been good if the case had been that of a private individual.] The enlargement of the time for making an award need not, unless the submission expressly requires it, be in writing or communicated to the parties. It must be assumed that the time was duly enlarged. [BRAMWELL, B.—To what time is it to be presumed it has been enlarged?] To the time of the making of the award. In *Burley v. Stephens*, 1 M. & W. 156, a cause was referred by order of *nisi prius* to the decision of an arbitrator, so as he made his award on or before the fourth day of Easter Term, with power to enlarge the time; but the order did not direct in what mode the time was to be enlarged. Two days before the time had expired, the arbitrator, in the presence of both parties, appointed another meeting on the 29th of June, on which day, one of the parties not having attended, the arbitrator made his award: and it was held that the appointment of a further day for the reference, neither party making any objection to it, amounted to a due enlargement of the time. The case does not show that \*this award was not made within twenty-one days from the time of the umpire's appointment: [\*521 for, it does not show when the order of sessions was drawn up; it might not have been drawn up until long after the October sessions: and the time for making the award or umpirage only begins to run from the period at which the duty devolves upon the arbitrator or umpire,—*Sherrett v. North Staffordshire Railway Company*, 2 Phill. 475; *Re Bradshaw and the East and West India Docks and Birmingham Junction Railway Company*, 12 Q. B. 562 (E. C. L. R. vol. 64). The defendant here makes a formal protest, and then allows the umpire to go on with the reference, attending for two days cross-examining the plaintiff's witnesses, and calling witnesses on behalf of the board. That, it is submitted, was a clear admission that the time had been duly enlarged and that the umpire had authority to make the award. In *Tyerman v. Smith*, 6 Ellis & B. 719 (E. C. L. R. vol. 88), it was held, that, on a compulsory reference under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, it is no objection to entering up judgment on the award, under s. 3, that the award was made more than three months after the arbitrator entered on the reference, (a) though the order of reference names no time, and no written consent for enlarging the time has been given by the parties, if it appear that the parties have within a month before the making of the award acted upon the reference as still subsisting; such acting estopping them from saying that the circumstances necessary to give jurisdiction to the arbitrator did not exist. [BLACKBURN, J.—Did the party there attend under protest?] That does not appear: but it cannot be material. *Andrewes v. Elliott*, 5 Ellis & B. 502 (E. C. L. R. vol. 85), is precisely in point. The cause was tried without a jury before a commissioner of *nisi prius*, not a judge of the superior courts. [\*522 \*The parties had consented; and the judge in open court sanctioned this course; but there was neither a judge's order, nor a

(a) See s. 15.

consent in writing. The unsuccessful party having moved for a new trial, it was held by the Court of Queen's Bench, that, the commissioner having general jurisdiction to try, the parties were precluded by their conduct from questioning the verdict on account of the absence of these preliminaries. And this decision was affirmed by the Exchequer Chamber: 6 Ellis & B. 338 (E. C. L. R. vol. 88). Lord Campbell, in *Tyerman v. Smith*, cites that case with approbation, saying,—“I think that the plaintiff is estopped from saying that there was not such a written consent as was essential to the statutable authority. *Andrewes v. Elliott* is expressly in point. Mr. Bramwell (and the case would have been the same had he then been a judge of the superior courts) had no jurisdiction without certain statutory requisites; and, had it been competent to the plaintiff to show that those requisites had not been fulfilled, the proceeding would have been void: but the principle of personal exception applied to the plaintiff. So, here, the plaintiff cannot be heard to say that there was no written consent: and we must therefore assume that the arbitrator proceeded under the statutable powers, and that the award is good, and the judgment properly signed.” [BLACKBURN, J.—I must confess I could not discover the principle on which that case of *Andrewes v. Elliott* was affirmed in the Exchequer Chamber. Under s. 15 of the Common Law Procedure Act, 1854, the objection might have been cured. Where the objection might have been cured, and the party by attending prevented that, it may be that he would be bound.] In *The Caledonian Railway Company v. Lockhart*, 19 Court of Sessions Cases 527, 3 Macq. 808, the time had been improperly enlarged, and yet the parties, having \*attended the reference, \*523] were held to be bound by the award: and that was the case of a corporation. In *Palmer v. The Metropolitan Railway Company*, 31 Law J. Q. B. 259, it was held by Mellor, J., in the bail court, that, if on a reference under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, the parties consent to enlarge the time for making the award beyond the statutable term of three months, the court will not set the award aside on the ground that it is made beyond the prescribed time and that the parties cannot by consent dispense with the provisions of the statute. [MELLOR, J.—I thought the party intended to avail himself of the award if it should turn out to be in his favour; and that therefore he was either estopped from objecting, or his conduct amounted to a new parol submission.] Here, the subsequent conduct of the board was at variance with their protest: by the course they pursued, they succeeded in cutting down the amount of the claim. In *Holt v. Meddowcroft*, 4 M. & Selw. 467, the trial was a nullity. So also in *Lycett (or Blissett) v. Tenant*, 4 N. C. 168 (E. C. L. R. vol. 33), 5 Scott 479. And that was the ground upon which the Court of Exchequer distinguished *Holt v. Meddowcroft* in *Farwig v. Cockerton*, 3 M. & W. 169. The protest here was conditional only; the board meaning to take the benefit of the award if it should turn out to be in their favour. In *Cooze v. Neumegen*, 9 M. & W. 290, where the date of the writ of summons and the recital of the writ itself were omitted in the issue, but the writ of trial was correct in these particulars, and the defendant at the trial protested against the irregularity, and refused to take any part in the proceedings,—a

rule afterwards obtained to set aside the issue and all subsequent proceedings was discharged with costs, on the ground that the defendant ought to have returned the issue when delivered, or applied before \*the trial to set it aside. "The defendant," said Lord Abinger, [\*524 "must have known of the defect in the issue when it was delivered, and he ought then to have applied to set it aside: but, instead of objecting to it, he allows the plaintiff to go on, and makes the proceedings a vehicle for incurring costs, which may have to be paid by his own client." And Alderson, B., said: "If a defendant wishes to take advantage of an irregularity in the proceedings, he should not appear at all at the trial, but should allow the plaintiff to go on at his peril." [SHKE, J.—You assume that your client would have been bound if the award had been against him?] No doubt: he was bound by his waiver. [BRAMWELL, B.—Waiver of what?] It is extremely difficult in such a matter to tie oneself to any very precise expression. [BLACKBURN, J.—Lord Wensleydale, in *The Caledonian Railway Company v. Lockhart*, says (3 Macq. 822): "I think that the principle 'Quilibet potest renunciari jure pro se introducto' applies, and that it was competent for both parties to agree to enlarge the time. Further, there is no doubt that they did so by the enlargement to a day in blank (which in effect by the Scotch law is for one year and a day), and also by their subsequent conduct." It would not matter much what was the form of the agreement.] Attendance imports an agreement. [BLACKBURN, J.—It would be strong evidence of an agreement.] The subsequent conduct of the defendant is in truth an abandonment of his protest. [BRAMWELL, B.—Suppose one of the witnesses had been indicted for perjury, could he have been convicted under the circumstances?] The same objection might have been urged in the case of *The Caledonian Railway Company v. Lockhart*.

*M Mahon*, in reply.—In *Tyerman v. Smith*, 6 Ellis & \*B. [\*525 719 (E. C. L. R. vol. 88), and the other cases where the conduct of the party has been held to amount to a waiver, the party appears to have attended without objection. Not only was this so in *Andrewes v. Elliott*, 5 Ellis & B. 502 (E. C. L. R. vol. 85), but the defendant led the other side to believe that he would not take the objection. Here, however, notice was given that it would be taken and insisted on. [MELLOR, J.—Judges should not be astute to aid unjust objections.] "It is much more important that a statute should receive its proper construction, than that justice should be doled out to suit the circumstances of each particular case:" per Maule, J., in *Martindale v. Falkner*, 2 C. B. 718 (E. C. L. R. vol. 52). In *The Caledonian Railway Company v. Lockhart*, 3 Macq. 808, there was complete acquiescence. Lord Campbell, C., in giving judgment (p. 811), says: "Here, by the mutual consent of both parties, the time was enlarged in writing in a way familiarly known according to Scotch procedure; and the enlargement of the 6th and 9th November, 1846, amounted to a fresh submission, giving the arbiter, in the most express language, 'at his pleasure further to enlarge the time, both parties binding and obliging themselves to acquiesce in and fulfil his award, and homologating and confirming the by-gone prorogations.' Accordingly, the appellants continued to attend the arbiter, and acquiesced

in his authority till the interim award was executed." Nothing could be more express. The cases of *Burley v. Stephens*, 1 M. & W. 156, and *Palmer v. The Metropolitan Railway Company*, 31 Law J. Q. B. 259, are altogether beside the present. It is plain that the statute here was not complied with, and that the board by their officer did all they could to resist the proceeding of the umpire. *Holt v. Meddowcroft*, 4 M. & Selw. 467, has never been overruled. Lord Ellenborough there says: "What might have been the effect of the \*526] \*defendant's appearing at the trial and making a defence without any protest against trying the issue, it is unnecessary at present to inquire, because we find that the defendant did protest, and did all in his power to resist the proceeding. I cannot agree that it amounts to a consent on the part of the defendant, because, being as it were tied to the stake, and dragged on to trial, he endeavours to make the best of it. The language of the statute does, I think, import a negative, and it may be very doubtful whether the witnesses would be indictable for perjury upon a trial such as this." That was acted upon in *Lycett v. Tenant*: and there the irregularity was such that the judges all held that the party was right in protesting. *Farwig v. Cookerton*, 3 M. & W. 169, and *Cooze v. Neumegen*, 9 M. & W. 290, were cases of mere irregularity. [MELLOR, J.—I know of no case where a protest in the form here adopted has been held available.] Nor is there any case where such a protest has been held to be insufficient. It is difficult to determine at the moment whether the objection be one of substance or a mere irregularity: it would be hard, therefore, to hold the party bound at his peril to stand upon his protest. It has never yet been held that attending before an arbitrator under protest is a waiver of an objection founded upon the absence of jurisdiction.

BRAMWELL, B.—We will suspend our judgment until next term. And we do hope that in the interim some settlement will be come to. We all think the case should not have gone as far as it has done.

*Our. adv. vult.*

The case of *Davies v. Price* came before the Exchequer Chamber, \*527] on appeal, on the 14th of June, \*1864. There, in an indenture of lease between the plaintiffs and the defendant, it was agreed, that, if any difference or doubts should arise respecting the construction of the lease, or anything therein contained, or respecting any matter or thing connected therewith, they should be referred to arbitration. A dispute arose as to whether the defendant was bound to give land for certain purposes mentioned in the deed, and whether the plaintiffs were entitled to damages by reason of his not having done so. Arbitrators and an umpire were appointed, but the defendant's arbitrator, E. M., was appointed with the limited authority to determine all differences or doubts of construction only. The plaintiffs' arbitrator and umpire awarded that the defendant by the indenture covenanted and agreed to give the said land for the purposes aforesaid, and that the defendant had not given the said land, and they assessed the plaintiffs' damages at 2000*l.*, and directed the defendant to pay the plaintiffs' costs. The defendant objected during the reference to the plaintiffs going into the question of compensation or damages, but did under protest attend when that question was gone into,

and cross-examined some of the witnesses. To an action on the award, in which the declaration stated that doubts had arisen as to the construction of the lease, and as to whether the plaintiffs had sustained any and what damages, the defendant pleaded (*inter alia*) that he did not choose the said E. M. to whom the said difference or doubts should be referred. It was held by the Exchequer Chamber,—affirming the judgment of the court below,—that the plea was proved, and was an answer to the action. See 11 Law T. N. S. 208.

BRAMWELL, B., now delivered the judgment of the court:—

\*We are all of opinion that the judgment of the Court of Common Pleas must be reversed. We think the case is [\*528 governed by the decision pronounced by this court the other day in *Davies v. Price*, on appeal from the Court of Queen's Bench, which we conceive to be exactly in point. The question in this case is not one of waiver, but whether an authority which did not otherwise exist is given by a party appearing and protesting against the umpire going on.

We are of opinion such an appearance under protest does not give any authority; and that there is no waiver, no estoppel; and consequently that the award was unauthorized and void. We come to this conclusion upon the authority of the case above referred to.

Judgment reversed.

### TOBIN v. HARFORD. June 18.

By a time policy the ship valued at 2000*l.* and goods valued at 8000*l.* were insured on a barter voyage to the coast of Africa; and it was stipulated that "outward cargo should be considered homeward interest twenty-four hours after arrival at first port or place of trade,"—"with liberty to extend the valuation of the homeward cargo."

The vessel with the outward cargo on board arrived at Kinsembo, the first place of trade on the coast of Africa, and there landed a portion of her cargo, and, after remaining at Kinsembo more than twenty-four hours, she sailed thence with the remainder, without having received any other goods there, and was totally lost:—

Held,—affirming the judgment of the Court of Common Pleas,—that the assured were only entitled to recover upon this policy the value of that portion of the cargo which was actually on board at the time of the loss.

THIS was an appeal against a decision of the Court of Common Pleas, 18 C. B. N. S. 791 (E. C. L. R. vol. 106). The statement of the case was as follows:—

1. The action was brought by Thomas Tobin (since deceased) and James Aspinall Tobin against the defendant as one of the underwriters of a policy of insurance on the ship *Shark* and her cargo.

\*2. The cause was tried before Erle, C. J., at the sittings in London after Trinity Term, 1862, when the following facts were [\*529 proved and admitted:—

3. The plaintiffs were merchants and shipowners at Liverpool, trading with various ports on the west coast of Africa.

4. On the 21st of June, 1861, the plaintiffs, through their agents, effected the policy in question on the ship *Shark* and her cargo, then about to sail from Liverpool for the coast of Africa.

5. The policy was subscribed in the usual way by the defendant, who is an underwriter at Lloyd's Coffee House for 100*l.*

6. The policy was for twelve months, commencing on the day of the vessel's leaving the dock at Liverpool, in port or at sea, in all places, at all times, and in all services, including the risk of craft, boats, and cranes to and from the vessel, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, and furniture, &c., of the good ship called the Shark, and so to continue and endure during her abode at Liverpool, and further until the ship had moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed: and it was to be lawful for the ship to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, with leave to discharge, load, unload, reload, sell, barter, exchange, and trade all or either goods and property upon the coast of Africa and African islands, and with any vessel or vessels, boat or boats, factories and canoes, in port and at sea, and to transfer interest from this to any other vessel or vessels, and from any other vessel or vessels to this vessel, all or any the risk to continue by the Shark and boats as \*530] above only, in port and at sea, and at any ports and \*places she might call at or proceed to, without being deemed any deviation, without prejudice to that insurance: and it was agreed that the vessel might be towed or otherwise assisted by steam-vessels or any other vessels during the voyage; and *outward cargo to be considered homeward interest twenty-four hours after arrival at first port or place of trade*. The policy was declared to be on ship valued at 2000*l.*, and on the cargo valued at 8000*l.*, with liberty to extend the valuation of the homeward cargo, and with liberty for the ship to move from dock to dock.

7. By a subsequent memorandum, it was agreed to continue the risk on the Shark, at the same rate of premium, until her arrival back, on the same conditions.

8. The Shark belonged to the plaintiffs, and she sailed from Liverpool on the 24th of June, 1861, with the cargo mentioned below for Kinsembo and the river Congo and other ports on the coast of Africa.

9. When the ship sailed she had on board a cargo, shipped at Liverpool, belonging to the plaintiffs, consisting of woollen and cotton goods, hardware, firearms, gunpowder, and a great variety of articles suited to the African trade, the invoice cost of which was admitted to be 6226*l.* 5*s.* 10*d.* [A copy of the bill of lading was annexed.]

10. The residue of the plaintiffs' interest in the ship and cargo not insured by the policy sued upon, was covered by other policies similar in form, except that they did not contain the clause, "outward cargo to be deemed homeward interest twenty-four hours after arrival at first port or place of trade."

11. No objection was made to the valuation of the ship and cargo in the policy.

12. The Shark arrived at her first port on the coast of Africa, \*531] namely Kinsembo, on the 14th of August, \*1861; and there at different times, on the 15th, 16th, and 17th of August landed and delivered to the plaintiffs' agents a part of the cargo. The invoice cost of the part so landed was 2952*l.* 8*s.* 3*d.*

13. There was no cargo taken on board at Kinsembo; but the

vessel sailed from there with the remainder of the cargo shipped at Liverpool, on the 17th of August, 1861, for the river Congo, and was by the perils of the seas wrecked and totally lost, with all the remaining cargo, on the 21st of August, 1861, in attempting to reach the river.

14. At the river Congo and other places on the coast of Africa there was some homeward cargo ready to put on board the Shark, and intended to be shipped by her.

15. The African trade is conducted almost wholly by barter, there being no coin in circulation.

16. African produce varies greatly in value. Ivory is worth 700*l.* a ton. Gum is worth 120*l.* a ton. Palm-oil is worth 40*l.* a ton. Dyewoods, 3*l.* a ton.

17. The value of a cargo of African produce consequently varies greatly, according to the quantity of the more precious commodities, on board.

18. Vessels in the African trade commonly call at several ports on the coast, both to land parts of the outward cargo and to take on board part or all of the homeward cargo, as it may happen to be provided or obtained by the owners' agents at such ports.

19. The plaintiffs have for many years traded to the African coast, and have factories at various places there.

20. After the loss of the ship and goods on board, as above-mentioned, the defendant settled and paid a total loss of 20*l.* upon his subscription on the ship.

21. The plaintiffs claimed also for a total loss on the cargo, in which case the defendants' liability to them on the policy would amount to 80*l.*

\*22. The defendant disputed his liability as for a total loss, but admitted a partial loss, namely, to the extent of the goods [\*532 actually lost with the ship, and paid 43*l.* into court as for that partial loss.

23. For the purposes of this appeal only, it was agreed between the parties that the said sum of 43*l.* should be taken to be sufficient to cover the defendant's liability, if he was only liable for a partial loss,—reserving right to the plaintiffs to proceed with the reference hereinafter mentioned should the judgment of the court below be confirmed.

24. Upon the above state of facts a verdict was taken, by consent, for the plaintiffs for 37*l.*, being the difference between the 43*l.* paid into court and the 80*l.* above mentioned; the defendant having leave to move to enter a verdict for him, if the plaintiffs were not entitled to claim as for a total loss on the cargo, and if the money paid into court was sufficient in that event to cover the plaintiff's claim: and the sufficiency or not was to be referred to the award of Mr. Richards, the average-stater.

25. In Michaelmas Term, 1862, the defendant obtained a rule calling upon the plaintiffs to show cause why the verdict should not be set aside, and a verdict entered for the defendant, or a nonsuit, on the ground that, on the true construction of the policy, the defendant was not liable for a total loss.

26. The rule was argued in Hilary Term, 1863, and the Court of



Common Pleas decided that the plaintiffs were only entitled to recover a partial loss, and ordered a verdict to be entered for the defendant.

The question for this court was, whether that rule ought to have been made absolute or discharged.

The case was argued in the Exchequer Chamber, before Pollock, C. B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., and Shee, J.

\*533] *Bovill*, Q. C. (with whom was *J. Brown*), for the plaintiffs, submitted that they were entitled to recover as on a total loss, according to the valuation in the policy,—citing *Shawe v. Felton*, 2 East 109, *Hill v. Patten*, 8 East 373, *Forbes v. Aspinall*, 13 East 323, and *Rickman v. Carstairs*, 5 B. & Ad. 651 (E. C. L. R. vol. 27).

*Mellish*, Q. C. (with whom were *Lush*, Q. C., and *Sir G. Honyman*), for the defendant, submitted that the court below were right in holding that the plaintiffs were only entitled to recover in respect of the "cargo" actually on board at the time of the loss,—relying on some passages from 2 Arnould on Insurance, 2d edit., 365 et seq.

*Cur. adv. vult.*

POLLOCK, C. B.—With the exception of my Brother Bramwell (who entertains some doubt upon the matter, though I believe he does not differ from the judgment we are about to pronounce), we are all unanimous in thinking that the judgment of the court below ought to be affirmed. I will merely add for my own part that the question as stated by Mr. Mellish seems clearly to be, what is the meaning of the word "cargo" in this policy. Does it mean such goods as may accidentally be on board the vessel at a particular moment? or must it not have reference to the anticipation of that which the vessel is intended to carry? Applying to the word the ordinary rule of construction, I think there cannot be a doubt that it means, not the goods which happen to be on board at the time,—which may no doubt be called the "cargo" in one sense, but that it must have reference to something more, to be derived from the known employment of the vessel, and not to that which really is a mere matter of accident.

\*534] CROMPTON, J.—I am of the same opinion, for the \*reasons given in the judgment of the court below, and now given by the Lord Chief Baron.

BRAMWELL, B.—Although my Lord has said he thinks there is not much doubt about the matter, I am sorry to say that to my mind there is considerable doubt, and that my own unassisted judgment would not have led me to the conclusion which the court below came to. This is the case of a valued policy on ship and goods, and it is upon a voyage on which the vessel is to sail with more or less of cargo on board, and to return with an uncertain amount of homeward cargo. The character of the African trade is such that it is impossible for the assured to say at any time what is the quantity of cargo on board, and what its nature and value. They can tell what is on board when the vessel starts upon her voyage out; and probably also when she has started upon the voyage home: but they cannot possibly know the quantity or value of the goods whilst the vessel is sailing between the intermediate ports. To provide for this uncertainty, they effect a policy for a gross sum as the assumed value which will at any time be on board. It is objected that this makes it a gaming policy.

But I see no other way in which the parties can protect themselves by an insurance. These contracts should be construed with reference to what is likely to happen, rather than with reference to remote possible contingencies. It certainly might be, as was suggested in argument, that there was little or nothing on board at the time of the loss. But that was not a very likely thing to happen. It was almost certain that the vessel would throughout have on board a substantial cargo. I see nothing unreasonable in assuming that. The parties manifestly intended that the policy should cover the ship and the goods on board at any time: and they agree that the ship shall \*be valued at 2000*l.*, and the goods on board at 8000*l.* It was conceded by Mr. Mellish that "cargo" here does not mean a full cargo. If the vessel took out only a partial cargo, and was lost on her outward voyage, it is admitted that the assured would be entitled to recover the 8000*l.* So, if lost on her voyage home with a cargo short of a full one. It is plain, therefore, that the word "cargo" does not mean a full cargo. What, then, does it mean? I have some difficulty in saying. It is suggested that it means the destined cargo, and not an incomplete cargo. Why so? Possibly, if the vessel had arrived at a port where a quantity of cargo was awaiting her, and having received some on board, was blown out to sea before the residue could be shipped, and lost, it might for aught I know be said that the intended cargo was not lost. Here, the vessel had on board all that she was at the time intended to have. She went out with a great quantity of goods, landed some of them at Kinsembo, and was lost with the residue on board. Suppose the goods remaining on board had been all the vessel started with, and none had been landed at Kinsembo, if I understand Mr. Mellish's concession right, the assured would have been entitled to recover the whole amount. She would then have had on board her destined cargo, and none of it having been put out, it would have been a cargo lost within the meaning of this policy, and the assured would have been entitled to recover the agreed value. But for the unanimous judgment of the court below, and the opinion of my learned Brethren, I must own that these considerations would have led me to think that the word "cargo" was simply identical with goods, and consequently that the true construction of the policy should be in conformity with the contention of Mr. Bovill. The authorities, too, I should have thought, are in favour of that \*view. [The learned Baron observed upon *Shawe v. Felton*, 2 East 109, *Forbes v. Aspinall*, 13 East 323, and *Rickman v. Carstairs*, 5 B. & Ad. 651 (E. C. L. R. vol. 27)]. [\*536]

BLACKBURN, J.—I agree with the majority of the court that the judgment of the court below is correct; and I also agree in what I understand to be the reasons on which that judgment is founded. With regard to the real point to be decided, the fact that this is a valued policy, is, in my mind, a mere accident, and does not affect the question. The question whether there was a total or a partial loss, is in this case, as I think it ought in every case to be, quite independent of whether the policy was valued or not. The question is, what is the subject-matter that is covered by the insurance? and whether the whole of the subject-matter is lost, in which case it would be a total loss; or whether only a part of it is lost, in which case it

would be a partial loss only, the amount of which would depend upon the proportion which the part that was lost bore to the whole subject-matter of the insurance. Then, if that is a valued policy, the value being admitted, the sum when reduced to figures is proved: if it be an open policy, you must prove the value of the whole subject-matter. When that is proved, it comes to the same result: the fact of the policy being valued merely dispenses with proof of value. There is some obscurity in the framing of this policy: but this much is clear, viz., that it is partly on ship and partly on goods. With the former, we are not now concerned; and, as to the latter, it seems to me to be immaterial whether the word used was cargo or goods. They mean the same thing. The ship sailed from Liverpool on this time policy; and it attached on the cargo which she had on board. She was bound \*537] for the west coast of Africa. The nature of the \*adventure was, that the cargo taken on board at Liverpool was intended to be substituted and exchanged by barter for cargo the produce of that country. The words of the policy were intended to meet that primitive style of trading. The effect of it is, that the insurance attaches on all the goods on board, as well those originally shipped as those which may from time to time be substituted. It appears that the cargo which went out from Liverpool arrived at Kinsembo, on the coast of Africa, where 57 per cent. of it was landed, and the ship was afterwards lost with the remaining 43 per cent. on board, nothing having been substituted for that part of the cargo which was landed. The proportion, therefore, which the goods lost bore to the goods which formed the subject-matter of the insurance was only 43 per cent. And that is in effect what was decided by the judgment of the court below. For these reasons, I am of opinion that the decision was right, and ought to be affirmed. Judgment affirmed.

END OF TRINITY VACATION.

CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF COMMON PLEAS,

IN  
*Michaelmas Term,*

IN THE  
TWENTY-EIGHTH YEAR OF THE REIGN OF VICTORIA. 1864.

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The Judges who usually sat in banco in the Term, were—  
ERLE, C. J.,                      BYLES, J.,                      KEATING, J.

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MEMORANDA.

IN consequence of severe illness with which he was seized at Exeter during the last Summer Assizes, Mr. Justice Williams was unable to take his seat in Court during this Term.

On the 10th day of November, 1864, the Right Hon. Thomas Erskine, formerly one of the Judges of this Court, died, in his 76th year.

John Bridge Aspinall, Esq., of the Middle Temple, having been appointed one of Her Majesty's Counsel learned in the law, took his seat within the Bar on the first day of this Term.

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\*JOHN TAYLOR, Appellant; RICHARD HUMPHRIES, [\*539  
Respondent. Nov. 18.

Persons walking from their residences in a town to enjoy the country air on a Sunday morning, and in the course of such walk resorting to an inn for refreshment, are "travellers" within the exception in the 11 & 12 Vict. c. 49, s. 1, although the inn be within two miles of their place of abode, provided they do not go abroad for the mere purpose of indulging a propensity for drink.

And, as the exception of "refreshment for travellers" is contained in the clause creating the prohibition, the burthen of showing that the prohibition has been infringed, and that the case is not within the exception, is cast upon the informer: and, if the innkeeper believes, and has

reason to believe (of which the magistrates are the judges), when he supplies the liquor, that he is supplying refreshment for a "traveller," he ought not to be convicted.

THIS was a case stated for the opinion of the Court of Common Pleas pursuant to the 20 & 21 Vict. c. 43, s. 2:—

At a petty sessions held at King's Heath, in the county of Worcester, on the 6th of May, 1864, John Taylor, a licensed victualler carrying on business at Moseley, in the parish of King's Norton, in the county of Worcester, appeared before John T. Lawrence and James Hunt, Esq., two of Her Majesty's justices of the peace, in answer to an information under the 11 & 12 Vict. c. 49, s. 1, charging him that he did, on Sunday the 17th of April then last, at the parish of King's Norton, in the said county, otherwise than for the refreshment of travellers, open his house and premises for the sale of wines, spirits, beer, and other fermented and distilled liquors, before half-past twelve o'clock in the afternoon.

It was proved by the evidence of Thomas Place, a police constable, that, at 20 minutes past 11 in the forenoon of the day mentioned in the information, he went to the defendant's house, and, finding the door closed, but unfastened, opened it, and walked in, and found that thirty-two men and women were in the house, of whom some were seated in the tap-room, others standing in the passage leading from the front door, and in which the bar-window is situated: some were drinking or had ale before them, and some of the male portion were smoking. The defendant's daughter was engaged in drawing beer \*540] for the company. The \*defendant told Place that they were all strangers, upon which Place replied,—“I suppose you call them travellers.” He (the defendant) said,—“Yes; they are travellers.” Several got up and said they came from Birmingham. They were strangers to the witness, and had the appearance of Birmingham artisans: and it was assumed or admitted that they came from Birmingham. Their conduct was orderly.

The defendant's house is situated a little more than two miles and a half from the centre of the town of Birmingham; and the borough extends to within about a mile and a half, and is built upon up to the boundary, and rows of houses or detached villas stretch to the village of Moseley.

Two of the customers on the occasion were called as witnesses, and proved that they were inhabitants of Birmingham, and had walked from the town through lanes and fields that morning, thereby extending their walk, the one to *seven miles*, and the other to *eight miles*, before reaching the defendant's house, where they had ale and bread and cheese on their way home; and that they did not leave home with the intention of visiting the defendant's house.

It was also proved by them that they were asked if they were travellers before being supplied, and that they replied that they were.

These witnesses were at that time within about two miles of their residences; and the few whose addresses were ascertained appeared to be inhabitants of that part of Birmingham nearest to Moseley, and within a mile and a half or two miles of it: of course, some might have come a greater distance.

Mr. *Suckling*, for the defendant, cited *The King v. Ivens*, 7 C. & P. 242 (E. C. L. R. vol. 32), *Tennant v. Cumberland*, 23 Justice of the

Peace 51, Atkinson, app., Sellers, resp., 5 C. B. N. S. 442 (E. C. L. R. vol. 94), and Taylor, app., Humphreys, resp., \*10 C. B. N. S. 429 (E. C. L. R. vol. 100), and contended,—first, that there [\*541 was not sufficient evidence of opening, as no distinct opening had been proved. The justices were of opinion that the fact of persons being in the house, especially in the entrance passage, and at the bar, although the policeman had not actually seen the door opened, was sufficient to enable them to draw an inference that the house had been opened; and, considering also that the witnesses for the defence proved that admission had been obtained without difficulty, were of opinion that the evidence was sufficient on this point.

It was then contended that the company were travellers, that they lived in another parish, and that, on their representing themselves to be such, the landlord was bound to supply them.

On the whole case, the justices were of opinion, that, for all that appeared to the contrary, the company assembled had come from Birmingham, many of them a distance of less than two miles; that, although the fact of a man being a traveller was not actually a question of distance, they considered they must be on a journey, or wayfarers; that, firstly, in the case of such as they assumed had only come from the near end of Birmingham, proceeding on foot a distance of less than two miles did not constitute a journey; and next, that the others who were shown to have taken a longer walk, and stopping a distance so near their home, had ceased to be travellers in the same degree as if the same individuals had arrived in Birmingham and applied for refreshments at a tavern in the same street as their own residences. They were of opinion that the fact of the public-house not being in the same parish as the residence of the customer was unimportant; and that, under the circumstances, the persons were not travellers, and that the inquiry made on the entrance of the customer could not be considered \*bonâ fide: and they fined the defendant [\*542 in the sum of 2*l.* and costs.

The case concluded with a statement that the defendant, being dissatisfied with the decision, requested the justices to state and sign a special case for the consideration of one of Her Majesty's courts of law at Westminster, and they the justices thereby did so accordingly.<sup>(a)</sup>

*Hayes, Serjt.*, for the appellant.—The conviction in this case turns upon the 1st section of the 11 & 12 Vict. c. 49, which, after reciting that "the provisions in force within the Metropolitan police-district, and in some other places in England, against the sale of fermented and distilled liquors in the morning of the Lord's Day have been found to be attended with great benefits," enacts "that no licensed victualler or person licensed to sell beer by retail to be drunk on the premises, or not to be drunk on the premises, or other person, in any part of Great Britain, shall *open his house for the sale of wine, spirits, beer, or other fermented or distilled liquors, or sell the same*, on Sunday, before half-past twelve o'clock in the afternoon, or, where the morning Divine Service in the Church, chapel, kirk, or principal place

(a) Byles, J., remarked upon the informality of the case in not presenting a question for the decision of the court: see Buckmaster, app., Reynolds, resp., 13 C. B. N. S. 62 (E. C. L. R. vol. 106).

of worship of the parish or place shall not usually terminate by that time, before the time of the termination of such service; and that no licensed victualler or other person in England shall open his house for the sale of wine, spirits, beer, or other fermented or distilled liquors, or sell the same, on Christmas Day or Good Friday, or any day appointed for a public fast or thanksgiving, before the respective \*543] times aforesaid, *except, in all the \*cases aforesaid, as refreshment for travellers.*" (a) Do the facts stated in this case show that the people who were found taking refreshment in the appellant's house were "travellers," within the exception? [KEATING, J.—Are we to judge of the bona fides of the inquiry made of the parties before they were supplied with refreshment?] The appellant is not responsible for the form of the case. That is drawn by the clerk to the magistrates: the parties have nothing to do with it. It may be assumed here that the house was opened: the only question then is, whether the persons found therein were travellers. That question has already been before this court upon two occasions. In *Atkinson, app., Sellers, resp.*, 5 C. B. N. S. 442 (E. C. L. R. vol. 94), the court repudiated the distinction sought to be made between a journey for business and a mere drive for pleasure: and Cockburn, C. J., said: "Of course, a man could not be said to be a traveller, who goes to a place merely for the purpose of taking refreshment. But, if he goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, he is entitled to demand refreshment, (b) and the innkeeper is justified in supplying it." \*544] There, the parties were distant from their \*home (Liverpool) about five miles and a half, having driven a round of eight or nine miles. Again, in *Taylor, app., Humphreys, resp.*, 10 C. B. N. S. 429 (E. C. L. R. vol. 100), the court held that a man who goes to a place a short distance from his home for the mere purpose of taking refreshment, is not a "traveller" within the meaning of the exception in the 18 & 19 Vict. c. 118, s. 2; but that one who goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, and whether on foot or otherwise, is a "traveller" within the statute. There, the appellant's house was distant from Birmingham about four miles, and some of the parties who were supplied with refreshment had walked from Birmingham, and the others had gone thence to the public-house by a public conveyance. Erle, C. J., in giving judgment, there says: "I am extremely desirous of giving effect to the intention of the legislature, which was, to prevent publicans from keeping open their houses during the hours of Divine Service, and also of giving effect to the intention of the magistrates, in endeavouring to prevent persons who are not travellers resorting to houses of entertainment at a short distance from their own homes, for the mere purpose of procuring drink. But, however, desirous I

(a) The 17 & 18 Vict. c. 79, and 18 & 19 Vict. c. 118, relate to the sale of beer, &c., in the afternoon of Sunday, Christmas-Day, Good Friday, and days of fast or thanksgiving.

(b) See *Rex v. Ivens*, 7 C. & P. 213 (E. C. L. R. vol. 32), where it was held that an indictment lies against an innkeeper who refuses to receive a guest, he having room in his house at the time; and that it is not necessary for the guest to tender the price of his entertainment, if his rejection is not on that ground; and that it is no defence for the innkeeper that the guest was travelling on a Sunday, and at an hour of the night after the innkeeper's family had gone to bed; nor is it any defence that the guest refused to tell his name and abode, as the innkeeper had no right to insist upon knowing those particulars.

may be to carry out these laudable intentions, I am unable to arrive at any other conclusion than that the facts stated in this case do not authorize the conviction. It appears that the three individuals who are charged to have been improperly supplied with refreshment, had walked from Birmingham, a distance of four miles. Now, whether they walked that distance on business, or for the purpose, for instance, of visiting a sick relative, or for pleasure, I do not think the legislature intended that they should be precluded from demanding, or the innkeeper be precluded from furnishing them with, necessary refreshment. In so \*deciding, I think we give effect to the decision [\*545 of this court in *Atkinson, app., Sellers, resp.*] [BYLES, J.—The facts are not the same as to all the persons found in the house.] As to some, the magistrates assume that they had merely walked from their own homes to the defendant's house; and, as to two of them, that they had ceased to be travellers when they got there. There was no evidence before them to justify their conclusion in either respect. The defendant could not know that they were other than "travellers," as they represented themselves. [BYLES, J.—If the innkeeper mistakes, and refuses to entertain them, he incurs the risk of an action.] Or an indictment: *Rex v. Ivens*, 7 C. & P. 213. [KEATING, J.—The magistrates came to the conclusion that the inquiry of the parties as to whether or not they were travellers, was not made *bonâ fide*.] There was nothing to warrant them in so assuming. In *Taylor, app., Humphreys, resp.*, 10 C. B. N. S. 433 (E. C. L. R. vol. 100), Erle, C. J., says: "I do not think the legislature intended to cast upon the innkeeper the burthen of proving in every case that the party refreshed is really a traveller. Before a man is convicted of the offence here charged, it seems to me that the complainant is bound to establish that he had the purpose of entertaining a person who was not a traveller." To constitute an offence within this statute, there must be a wilful opening of the house to a person other than a traveller; and that must be made out by facts which fairly warrant the conclusion.

*Keane, Q. C.*, for the respondent.—By the 14th section of the Summary Convictions Act, 11 & 12 Vict. c. 43, the burthen of establishing an exception is cast upon the accused,—“Provided always, that, if the information or complaint in any such case shall negative any exemption, exception, proviso, or condition in the \*statute on which the same shall be framed, it shall not be necessary for the prosecutor [\*546 or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same.” This defendant, therefore, was bound to show that his house was opened for the accommodation and the beer, &c., supplied for the refreshment of “travellers.” Thirty-two persons were found in this house drinking and smoking and eating bread and cheese. An account is given of two of them: the remaining thirty are unaccounted for; and the door of the house is found open. The magistrates found that the conduct of the appellant was not *bonâ fide*. The only question now is, whether there was any evidence to warrant their conclusion. What constitutes a traveller, has always been felt to be a question of difficulty. The obvious intention of the legislature was, that those only should be entitled to demand refreshment



within the prohibited hours, who had as travellers or wayfarers encountered such a degree of toil as to render refreshment a positive necessity. [ERLE, C. J.—Are we bound to hold that these persons could not be travellers, because they are within two miles of their homes?] The question is whether there was not evidence upon which the magistrates were justified in convicting the party. [ERLE, C. J.—You want us to insert the words “needing refreshment.”] That, it is submitted, is involved in the word “traveller.” [BYLES, J.—The meaning of the words “except as refreshment for travellers” may be, that the innkeeper is not to supply an unreasonable quantity, but only so much as may suffice for the reasonable refreshment of a traveller.] In a case of *Tennant v. Cumberland*, 28 Justice of the Peace 51, it was held that the burthen of proof lay upon the innkeeper. \*547] [BYLES, J.—The case does not state by whom the \*witnesses were called. If they were called by the prosecutor, we must assume that the facts stated as to the two would apply equally to all the others.] If the burthen of disproof is upon the innkeeper, there can be reason for assuming that. The court can only assume that the case before the magistrates was conducted in the usual way.

*Hayes*, Serjt., in reply.—This case is not in substance distinguishable from that of *Taylor*, app., *Humphreys*, resp., 10 C. B. N. S. 429 (E. C. L. R. vol. 100). The court will not, it is submitted, depart from that decision; but, in a case which applies to so large a number of meritorious trades-people, and which affects in so inconvenient and arbitrary a manner the comforts of the artisans of this country, will endeavour to lay down some clear and definite principle by which this statute may in future be construed. The intention of the legislature evidently was, to promote the due observance of the Lord's Day, and to prevent persons from resorting during the hours of Divine Service to public-houses for the purpose of indulging in excessive drinking, and not to deprive of the opportunity of obtaining needful refreshment those who, after spending six days in toiling in the close and unwholesome atmosphere of a large town, resort to the country for relaxation and amusement. And, as the exception of “refreshment for travellers” is contained in the clause which creates the prohibition, the burthen of proving that the prohibition has been infringed, and that the case is not within the exception, is cast upon the informer. *Cur. adv. vult.*

ERLE, C. J., now delivered the opinion of the court:(a)—

\*548] \* In this case the question is, whether the evidence supported the information: and the answer depends mainly upon the meaning of the word “traveller” in the statute.

It has been contended, for the appellant,—that, as the persons admitted into the house were artisans of Birmingham walking into the country on Sunday morning, and needing refreshment by reason of the walk, therefore they were travellers taking refreshment, within the words of the act,—that the inhabitants of Birmingham and other similar towns may well desire to emerge from a crowded region covered with bricks and smoke, and are legally and morally right in

(a) The judges present at the argument were, Erle, C. J., Byles, J., and Keating, J.

gratifying that desire by taking a walk into the country during the hours best suited for a sight of the sun, on the only day on which artisans are free, in other words, on Sunday morning,—that the prohibition against supplying any fermented liquor, and indeed any sustenance whatever on Sunday till half-past twelve, imposed upon all throughout Great Britain who have any license whether to sell cider or beer or wine or spirits, attaches on a very large part of the class that gain their livelihood by supplying food to the stranger and the homeless,—and that the habits and the wants of the persons maintaining themselves in the area over which the statute has operation are infinitely various, and, as this extensive prohibition is subject to an exception, the exception was probably intended to be capable of extensive application in proportion to the extent of the prohibition,—that the intention of the legislature in the prohibition evidently was, to promote the better observance of the Lord's day in general, and in particular by excluding those who yield too much to the attraction of the public-house from their accustomed haunts, to bring them to places of worship, and so to the paths of piety and virtue,—that this intention of the \*legislature might also be in part [\*549 promoted by promoting resort to the beauties of nature at proper seasons, and allowing wholesome refreshment needful for the comfortable enjoyment thereof,—that this intention would probably be in part defeated by confinement in noisome air and deprivation of wholesome sustenance where needed,—and that therefore the word "travellers" ought to be construed to include all who fare abroad, either from a desire to enjoy country sights and sounds, or from any other motive of business or pleasure except desire for excessive drinking; and that any supply of refreshment needed by reason of such faring abroad ought to be construed to be refreshment to a traveller.

He further contended, that, as the exception of refreshment to a traveller is contained in the clause creating the prohibition, the burthen of proving that the prohibition has been infringed, and that the case is not within the exception, is cast on the informer (*The King v. Pratten*, 6 T. R. 559; *Gill v. Scrivens*, 7 T. R. 27); and that, if the publican believed, and had reason to believe, when he supplied the drink, that he was supplying refreshment to a traveller, he ought not to be convicted.

In this argument we think the appellant is well founded, and that the statute ought to be construed on the principles that he has contended for. We think that a person would be a traveller within the exception, if he came abroad from any of the motives above suggested as legitimate, and by reason thereof needed refreshment: but, if he came abroad merely because he desired to go to a public-house and obtain drink, he would not.

The circumstances under which the guest was admitted and supplied would be matter for consideration in deciding whether the publican had reason to believe \*and did believe that he was a traveller within this description either when he admitted him [\*550 or when he afterwards supplied him; such as, whether he was a stranger or a neighbour, whether he delayed longer or took more than was consistent with the need of refreshment. The distance also would be relevant: but no rule can be laid down for a defined dia-

tance, as that which may be short for the vigorous may be long for the weakly.

The cases decided on this matter support the appellant's argument. In *Atkinson, app., Sellers, resp.*, 5 C. B. N. S. 442 (E. C. L. R. vol. 94), the magistrates convicted, because the guests had taken a drive of a few miles for pleasure on Sunday afternoon,—being of opinion that business was necessarily included in the idea of travelling; but the court quashed the conviction. Cockburn, C. J., says that a man cannot be said to be a traveller, who goes to a place merely for the purpose of taking refreshment; but that, if he goes to an inn for refreshment in the course of a journey, whether of business or pleasure, he is entitled to demand, and the innkeeper is justified in supplying it: and Crowder, J., says that the only real distinction is, between a man living in the neighbourhood at a distance; and that, whether he is travelling for pleasure or on business, cannot make any difference. In *Taylor, app., Humphreys, resp.*, 10 C. B. N. S. 429 (E. C. L. R. vol. 100), the magistrates convicted, where the guests had walked out on Sunday afternoon about four miles, for their pleasure: but the court quashed the conviction, on the ground that a man might be a traveller, though he was walking for pleasure, and had not exceeded the distance above mentioned, and adopted the reasons given by the Chief Justice in the last-mentioned case.

The context of the statute supports the appellant's argument. \*551] Section 1 prohibits every licensed victualler \*and every beer-house keeper in Great Britain from opening his house for the sale of, and from selling, any fermented or distilled liquor, on Sunday, before 12.30 P. M., except as refreshment for travellers. Section 8 prohibits every licensed victualler and beer-house keeper, and every person licensed or authorized to sell any fermented or distilled liquor, and every person claiming to sell wine by retail by reason of being free of the vintners' company or any other right or privilege, from opening a house for sale of any article whatsoever during the prohibited hours, except as refreshment for travellers. Section 4 prohibits every person from opening any house or place of public resort for the sale of fermented or distilled liquors, or from selling such liquors, during the prohibited hours, except as refreshment for travellers. Section 5 empowers constables to enter any house or place of public resort for sale of such liquors at any time. Section 6 makes every person offending against this statute liable to a penalty not exceeding 5*l.* for each offence, and declares that every separate sale shall be a distinct offence.

These provisions are very stringent. For example, this appellant might have been fined 160*l.*, that is, 5*l.* for each guest. They do not bear upon the rich, who have refreshment at their command; but they coerce the poorer classes throughout the island,—salutary, where they check the disorderly; pernicious, where they molest the discreet: and we consider, that, by construing the exception in a wide sense, we save from vexatious restriction many who have a right to be trusted with self-control, and at the same time leave the prohibition in force as far as the interests of real piety are concerned.

The result is, that the case should be sent back. We place great reliance on the local knowledge of the magistrates. They can tell

whether the appellant \*believed with reason that his guests were travellers, taking refreshment according to the description above given, or were making a pretence to that character for the purpose of profaning Sunday and passing it in drinking. [\*552]

Probably it would not be worth while to proceed further against the appellant upon the present facts, because, unless he raises the question again by his future conduct, the information will not have been without effect. If he does raise the question again, the principles here explained may probably guide to a decision in accordance with our view of the law. Rule accordingly.(a)

(a) See Fisher, app., Howard, resp., 5 New Rep. 118. There, several persons having taken their tickets at 12.30 p. m. on Sunday at a railway station within the metropolitan police-district, for a train by which at 12.50 p. m. they afterwards proceeded to a place nine miles distant, were served in the interval with fermented liquors at the refreshment-rooms inside the railway station which were opened at 12.40: and it was held that they were travellers within the meaning of the 42d section of the 2 & 3 Vict. c. 47, which enacts that "no licensed victualler or other person shall open his house within the metropolitan police-district for the sale of wine, spirits, beer, or other fermented or distilled liquors on Sunday, Christmas Day, and Good Friday, before the hour of one in the afternoon, except refreshment for travellers."

It was there contended that a person could not be considered a "traveller" when he had not commenced a journey; nor when he had completed it, if his home were near. But Crompton, J., observed,—“Is a man not a traveller who has started on his journey and taken his ticket, simply because he prefers having refreshment before the train starts, to having it at an intermediate station? Is a man who has taken his ticket and got into the carriage, not a passenger, simply because the train has not yet moved? The common sense of all mankind will say that these persons were clearly travellers.” And Mellor, J., said: “The object of the statute was, \*to prevent persons sitting and drinking in public-houses during those hours. It would be an abuse of the statute to say that a man who has taken his ticket, as in this case, is not a traveller within the meaning of the section.” [\*553]

The magistrates at Preston recently, under Jervis's Act, 11 & 12 Vict. c. 43, s. 5,—which enacts “that every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is or shall be by law liable to, and may be proceeded against and convicted either in the county, riding, division, liberty, city, borough, or place where such principal offender may be convicted, or in that in which such offence of aiding, abetting, counselling, or procuring may have been committed,”—convicted two persons who were found drinking in a public-house on Sunday during the prohibited hours, for “aiding and abetting” the publican in a breach of the statute.

### HELPS and Another v. J. W. CLAYTON and CHARLOTTE MARY HENRIETTA his WIFE. Nov. 10.

1. In the case of a settlement of personal property, the practice is for the lady's solicitor to draw the settlement, and for the husband to pay for it.

2. Where the lady was an infant residing with and forming part of the family of her father, and the instructions for the settlement were given by the father, under circumstances from which the court (exercising the functions of a jury) inferred that such instructions were given by her father as her agent,—Held, that she, sued jointly with her husband, was liable for the expenses as for a debt contracted by her for necessities before the marriage.

THIS was an action brought by the plaintiffs for money payable by the defendant Charlotte Mary Henrietta, whilst she was sole and unmarried, to the plaintiffs, for work done and materials provided by the plaintiffs for the said Charlotte Mary Henrietta, whilst \*she was sole and unmarried, at her request, for fees due and [\*554]

of right payable from the said Charlotte Mary Henrietta, whilst she was sole and unmarried, to the plaintiffs in respect thereof, and for money paid by the plaintiffs for the said Charlotte Mary Henrietta, whilst she was sole and unmarried, at her request.

The defendants pleaded,—first, never indebted,—secondly, that, at the time of contracting the alleged debt, the defendant Charlotte Mary Henrietta was an infant,—thirdly, payment.

The plaintiffs replied to the plea of infancy, that the debt was in respect of necessities: and upon this replication and the other pleas issue was joined.

The cause came on to be tried before Erle, C. J., at the sittings at Westminster after Hilary Term, 1864, when, by consent, a verdict was found for the plaintiffs for 73*l.* 5*s.* 6*d.*, subject to a special case, which stated as follows:—

1. The plaintiffs are attorneys and solicitors practising at Gloucester. The defendant, Captain J. W. Clayton, was, in the summer of 1862, engaged to be married to his present wife, then about eighteen years of age, and residing at Gloucester with her father, Colonel Somerset, with whom she had always resided since her birth. On the 14th of August, 1862, Colonel Somerset called at the office of the plaintiffs, who had occasionally previously acted as his (Colonel Somerset's) solicitors, with a letter from the defendant J. W. Clayton, containing proposals for a settlement, in the terms following:—

“11, Portman Square.

“Dear Colonel Somerset.

“I am not a rich man; but am able to settle on your daughter the sum of 10,000*l.* on my marriage. As all the rest of my property is entailed, provision is made under my father's will for my wife and \*555] children. \*I shall be much obliged if you will nominate a trustee; and I refer you to my solicitor, Mr. Charles Barnard, 4, Gray's Inn Place. I can also allow the young lady 100*l.* per annum for pin-money.

“J. W. CLAYTON.”

2. Colonel Somerset instructed the plaintiffs to take the necessary steps in the matter for the lady, his daughter, and named his cousin, Mr. Granville Somerset, as trustee on behalf of the lady, and requested Messrs. Helps to put themselves in communication with him. The plaintiffs acted accordingly; and Mr. Granville Somerset, on behalf of the lady, corresponded with them on the requirements of the settlement.

3. On the 14th of August, 1862, the plaintiffs wrote as follows, to Mr. Barnard, the then attorney for Captain Clayton:—

“Gloucester, 14th August, 1862.

“Dear Sir,—We are instructed by our client Colonel Somerset to prepare the settlements on the approaching marriage of his daughter with Captain Clayton. We understand Captain Clayton's father proposes to settle 10,000*l.* on the young people, and to allow the lady 100*l.* a year for pin money. Colonel Somerset has been asked to name a trustee, and we are instructed to name his relative Granville Somerset, of 3, Tanfield Court, Temple, barrister-at-law. Will you kindly at once prepare proposals for the settlement, and supply us with an abstract of any will or family settlement (if any such abstract should be required), to show the title to the money. We under-

stand the marriage is to take place very shortly; we shall therefore be glad to see you as soon as possible.

"Yours very faithfully,

"Charles Barnard, Esq., "RICHARD HELPS & SON.

"4, Gray's Inn Place, Gray's Inn, London."

\*4. To this letter Mr. Barnard replied as follows:—

"4, Gray's Inn Place, Gray's Inn, [556  
18th August, 1862.

"Gentlemen,—I have to acknowledge the receipt of your letter of the 14th instant, and I would have answered it before, but that I was out of town.

"Captain Clayton some time since instructed me as to the settlement, the draft of which I have already prepared, and it is now before conveyancing counsel for settlement. I would submit (independently of the fact of my having already prepared the draft) the doing so would devolve on me as representing the intended husband, whose money is to be settled. From my instructions, I did not understand the lady would bring anything into settlement. I will with the draft settlement forward you an abstract of the will of Captain Clayton's father, under which the captain takes an estate for life in certain freehold and leasehold estates, with trusts afterwards for the children of the captain's marriage; and a power is also given to the captain to appoint a life-interest to his wife. You will also be furnished with an abstract of a settlement already made by Captain Clayton, in 1854, on his attaining his majority. This settlement he has the power of revoking on his contemplating marriage.

"Yours faithfully,

"CHARLES BARNARD.

"Messrs. Helps & Son."

5. To this, the plaintiffs replied, as follows:—

"1, Barton Street, Gloucester,  
20th August, 1862.

"Somerset—Clayton.

"Dear Sir,—After I left you, I discussed the question raised as to whose duty it was to prepare the settlement, with my friend and agent Mr. Lucas, of 8, \*New Square, Lincoln's Inn. He states that the lady's solicitor always prepares the settlement, unless there [557  
are two, a personalty settlement, and a settlement of the husband's real estate. The settlement on the intended wife is always prepared by her solicitor or the solicitor of her family; and her intended husband has the privilege of paying for her settlement.

"I am quite satisfied that this is the rule: but, if you are not convinced, I shall be happy to leave the question to the president or council of the Incorporated Law Society; and Mr. Lucas will arrange the matter with you, to ask the question personally or by letter.

"I ought to have mentioned to you, that Mr. Granville Somerset, the intended trustee for the lady, has serious objections to trust-funds being invested in ordinary shares or stock in any railway; but would not object to Indian railway-stock guaranteed by the Indian government.

"Yours very faithfully,

"Charles Barnard, Esq.

"RICHARD HELPS."

6. The matter was accordingly referred to Mr. Cookson; and that

gentleman decided that beyond all doubt the practice in the profession is, that the lady's solicitor should draw the settlements, and that the gentleman has the privilege of paying for them.

7. In this decision Mr. Barnard acquiesced; and the plaintiffs prepared the settlements, and, at the request of Mr. Barnard, sent their bill to the defendant, Captain Clayton. Mr. Barnard did not, however, at any time previously to the plaintiffs' sending in their bill as hereinafter stated, inform the defendant Captain Clayton thereof; nor did he obtain his concurrence therein or assent thereto.

8. On the 1st of September, 1862, the plaintiff Richard Sumner \*558] Helps attended Miss Somerset, at her \*father's house, to make an appointment with her for the execution by her of the settlements; and, on the 8d of the same month, the plaintiff Richard Helps attended with the defendant Captain Clayton's then attorney, Mr. Barnard, at Enfield Court, where Miss Somerset and her father Colonel Somerset signed the settlements after Mr. Richard Helps had explained to the defendant C. M. H. Clayton, that they had been approved by her relative and trustee Mr. Granville Somerset. The agents for the plaintiffs had upon the same day attended upon Captain Clayton at Mr. Barnard's office, and attested his execution of the settlement in duplicate. Save as above, the plaintiffs had no communication with the defendant C. M. H. Clayton on the subject of the said settlement.

9. The marriage took place on the 4th of September, 1862.

10. In the month of April following, the plaintiffs sent in to the defendant Captain Clayton their bill for the settlements; when it was returned to them, accompanied by the following letter:—

"14, Portman Square, April 24th, 1863.

"Gentlemen,—I beg to return you the enclosed account. As I did not retain you to act for me, I must decline paying it.

"Yours obediently,

"J. W. CLAYTON.

"Messrs. Helps & Son."

11. In consequence of this letter, the plaintiffs took advice as to enforcing their claim against Captain Clayton, and were advised, that, although the defendant was liable to pay for his settlement, yet, inasmuch as there was no privity between the plaintiffs and Captain Clayton, Colonel Somerset should pay the amount claimed, and that \*559] Captain Clayton should \*be sued in the name of Colonel Somerset as for money paid to his use. The defendant Richard Helps communicated this opinion to Colonel Somerset, and requested him to pay the amount. Colonel Somerset then gave to the plaintiffs a check for 73*l.* 5*s.* 6*d.*, the amount of the bill, and instructed the plaintiffs to sue the defendant J. W. Clayton for money paid to his use; but the plaintiffs in no other way than as above mentioned claimed the money from Colonel Somerset, or from any person other than the defendant.

12. An action was commenced accordingly: but, before it came on for trial, a case was submitted to counsel, who advised that the action as brought by Colonel Somerset was not maintainable, and that Colonel Somerset's daughter, the defendant C. M. H. Clayton, was in point of law the employer of the plaintiffs, and that the money should be refunded to Colonel Somerset. Acting upon this advice, the plain-

tiffs returned the said money to Colonel Somerset, and brought the present action.

13. The court was to be at liberty to draw any inferences which a jury would be warranted in arriving at from the facts above stated.

14. On behalf of the plaintiffs it was contended that the plaintiffs were retained by and on behalf of the defendant C. M. H. Clayton, and that the charge for the settlements was as for a necessary supplied to her suited to her degree and condition, and so was a debt due from her at the time when she intermarried with the defendant J. W. Clayton, and for which the said J. W. Clayton was therefore liable, as her husband.

15. On behalf of the defendants, it was contended that the plaintiffs were not retained by or on behalf of the defendant C. M. H. Clayton as alleged, and that the charges sought to be recovered by the plaintiffs \*were not for necessities supplied to the said [560 defendant Charlotte Mary Henrietta Clayton, as alleged.

If the court should be of opinion that the defendants were liable, the verdict was to stand for the plaintiffs for 78l. 5s. 6d. If otherwise, the verdict was to be set aside, and a verdict entered for the defendants.

*Gray, Q. C.* (with whom was *O'Malley, Q. C.*), for the plaintiffs.—Three questions arise upon this special case,—first, whether the plaintiffs were retained to prepare the settlement by Mrs. Clayton or by Colonel Somerset, her father,—secondly, whether the giving the check by Colonel Somerset operated as payment so as to discharge the debt, assuming it to be a debt of the husband,—thirdly, whether the lady, who was an infant at the time the instructions for the settlement were given, was liable as upon a contract for “necessaries.”

1. It is submitted that Colonel Somerset incurred no liability. It is true that it was he who first put the plaintiffs in motion: but, in point of fact, the credit was given to the lady, the plaintiffs being employed by Colonel Somerset as her agent, and they relying upon the well-known rule of the profession, that the settlement is prepared by the solicitor of the lady, and paid for by the husband. The lady was aware that the plaintiffs were acting on her behalf, and assented thereto; the law, therefore, would imply a promise on her part to pay. [BYLES, J.—Suppose the negotiation goes off, who would be liable?] The lady, of course. [BYLES, J.—Then, the reason of the rule seems to be this, that the husband becomes liable where the marriage takes effect, because it is his wife's debt.] The ground of the rule is shown in the case of *Haywood v. Fiatt and Wife*, 8 C. & P. 59 (E. C. L. R. vol. 34). 2. Then, was there a payment? When the bill was sent to Captain \*Clayton, he returned it, saying [561 that he never employed the plaintiffs. Colonel Somerset thereupon sent the plaintiffs a check for the amount, upon the understanding that he was to sue Captain Clayton for it. Being afterwards advised that Colonel Somerset could not maintain an action, the payment was treated as a payment under a mistake, and the money was returned. It was not a payment by Colonel Somerset at the request or on behalf of either his daughter or Captain Clayton. There was no privity. It was like a payment by a stranger. 3. Then, was this a contract for necessities? Marriage is a contract which the law allows



an infant to enter into: and an infant is liable for necessities supplied to his children. In *Chapple v. Cooper*, 13 M. & W. 252, it was held that an infant widow was bound by her contract for the furnishing of the funeral of her husband, who had left no property to be administered,—on the ground that the contract for the burial of the husband was the same as a contract by the widow for her own personal benefit. There can be no reason, therefore, why an infant should not pledge her credit to a solicitor employed to see that the arrangements for a settlement (which is an essential part of the contract of marriage) are properly carried out. It is difficult to conceive a contract more clearly for the infant's benefit. [BYLES, J.—Captain Clayton, no doubt, would have married the lady without any settlement. Is it a “necessary” for a lady to have 10,000*l.* settled upon her?] Having an offer of a settlement of 10,000*l.*, it is necessary that she should have legal advice as to the mode of effecting it. [WILLIAMS, J.—No doubt it is reasonably necessary that she should have the legal assistance of some one in whom she could confide, to look to her interests in the arrangement of the terms of the contract.] In \*562] ascertaining what are “necessaries,” regard \*must always be had to the position of the infant. [BYLES, J.—And the occasion.] “Necessaries,” says Vaughan, J., in *Brayshaw v. Eaton*, 5 N. C. 231, 234 (E. C. L. R. vol. 35), 7 Scott 180, “is a word of relation: what is necessary in one station is not necessary in another.” [WILLIAMS, J., referred to *Rainsford v. Fenwick*, Carter 215, where the question was whether wedding-clothes were necessities for an infant.] The infant might be an orphan, without friend or relation. What would be her position then?

*Huddleston*, Q. C. (with whom was *Inderwick*), for the defendants.—To entitle the plaintiffs to succeed in this action, they must establish two propositions,—first, that the infant made a contract,—secondly, that it was a contract for “necessaries.” 1. The first is a question of fact: and here the court are to draw inferences as a jury. There are three parties,—the father, the lady, and the intended husband. To which of these did the plaintiffs give credit? Looking to the facts stated, can the court for a moment doubt that the plaintiffs gave credit either to Colonel Somerset or to Captain Clayton, and not to the lady? Then, see whether the circumstances do not show a contract with Colonel Somerset? The plaintiffs were his solicitors. He goes to them with Captain Clayton's letter in his hand, gives them instructions to prepare the settlement, and names a trustee, with whom he puts the plaintiffs in communication. By whom did the plaintiffs consider they were instructed when they wrote the letter of the 14th of August, 1862, to Captain Clayton's solicitor? Could they after that turn round and charge Captain Clayton? [WILLES, J.—Is it not very much like the case of landlord and tenant? The landlord's solicitor prepares the lease, and the tenant pays for it; or, at least, \*563] the landlord pays his attorney, \*and sues the tenant for money paid to his use. The liability in the first instance, I should think, rests between Colonel Somerset and the lady.] Colonel Somerset set the plaintiffs in motion. Probably, if Colonel Somerset had paid the bill, he might have been entitled to recover against Captain Clayton. But, as between *these* parties, the credit clearly was given

to Colonel Somerset. [KEATING, J.—The letter of the 14th of August, it must be observed, was written by a person who was fully cognisant of the usage of the profession. BYLES, J.—The letter of the 20th bears the most strongly against you on this part of the case.] Those letters only show that the plaintiffs considered that they were to look for payment either to Colonel Somerset or to Captain Clayton. [BYLES, J.—Captain Clayton might be liable in two ways, personally upon the usage, or in right of his wife.] In no case, it is submitted, could the lady be liable. Suppose the marriage had not come off, could there be a doubt that the plaintiffs would have had a good claim against Colonel Somerset? Down to the 20th of August, there is no suggestion that any one but Colonel Somerset could be liable. Captain Clayton had at that time employed his own attorney, Barnard. There being a controversy as to which of the solicitors should draw the settlement, the matter was referred to Mr. Cookson, a gentleman of great experience. That gentleman having decided the practice to be,—as it undoubtedly is,—for the lady's solicitor to prepare the settlement, and for the gentleman to pay for it, the plaintiffs did the work, and sent in their bill to Captain Clayton.(a) Suppose the marriage went off, and the lady (being of full age) was sued, would there be any evidence to go to the jury of a retainer by her? Down to the time of bringing this \*action, there was no suggestion that credit had been given to her. [WILLES, J.—The [\*564 parties probably acted upon the case of *Grissell v. Robinson*, 3 N. C. 10 (E. C. L. R. vol. 32), 3 Scott 329.(b)] 2. Then, as to the question of necessaries. [BYLES, J.—That presents the greatest difficulty.] In Com. Dig. *Infant* (B. 5), it is laid down that "necessaries for an infant's wife are necessaries for him; but not if provided in order to the marriage: *Turner v. Trisby*, 1 Stra. 168." In *Wharton v. Mackenzie and Cripps v. Hills*, 5 Q. B. 606 (E. C. L. R. vol. 48), D. & M. 545, upon a replication to a plea of infancy, that the goods were necessaries suitable to the degree, estate, circumstances, and condition of the defendant, an under-graduate of the university, it was held that his rank or allowance is not so much to be considered as his situation in statu pupillarii at college, with most things necessary for his subsistence found for him. And in *Smith v. Gibson*, Peake's Add. Cas. 52, it was held that money advanced to place out a female infant apprentice is not recoverable (in an action against her and her husband, she having subsequently married), on a promise by her to repay the money, as not being for necessaries. It is difficult to see how a settlement can be a benefit to an infant unless she marries: and then it would not be a benefit which enured to her dum sola. [WILLES, J.—In *Chitty on Contracts*, 7th ed. 140, it is said that an infant [\*565 \*may, with the approbation of the Court of Chancery, make a marriage-settlement, or a contract for a marriage-settlement: and in

(a) Gray stated that this bill was made out charging the husband and wife.

(b) There, one P. orally agreed to grant the defendant a lease for sixty years: the defendant paid part of the consideration, but P. died before the contract was carried into effect. The plaintiffs, P.'s executors, then granted the lease, which recited that P.'s agreement had been treated as void by the Court of Chancery, and that the lease was granted pursuant to a proposal of the plaintiffs thereafter mentioned. The plaintiffs having paid their own attorney his charges for drawing the lease,—it was held that they were entitled to sue the defendant for money paid, and that in their own right.

a note it is added,—“It seems that a feme infant, before the 18 & 19 Vict. c. 43, s. 1, might sometimes be bound by a marriage contract properly settling her property, and fairly entered into with the consent of her friends and relations;” citing *Ainslie v. Medlycott*, 9 Ves. 13, and *Milner v. Lord Harewood*, 18 Ves. 259.] On neither ground, it is submitted, can the plaintiffs be entitled to sue Captain Clayton.

*Gray*, in reply.—There was abundant evidence of a request by Miss Somerset to the plaintiffs to prepare the settlement, and that they looked to Captain Clayton as the paymaster, through his wife. There is no pretence for saying that the lady would not have been liable as upon a contract for necessaries, if the marriage had never taken place.

*WILLES, J.*—This case has been most satisfactorily argued; and, as it involves points of some nicety, we will take time to consider our judgment.

*Cur. adv. vult.*

*WILLES, J.*, now delivered the judgment of the court: (a)—

This case was well argued at the sittings after Trinity Term, by Mr. Gray for the plaintiffs and Mr. Huddleston for the defendants, before my Brothers Byles and Keating and myself, when we took time to consider.

It was an action brought by solicitors, to recover the costs of preparing a settlement upon the marriage of \*the defendants, \*566] claimed as a debt payable by the defendant Mrs. Clayton, her husband being made a defendant for conformity only.

The pleadings raise two questions,—first, whether there was any debt incurred by Mrs. Clayton in respect of these costs,—secondly, whether, if it was incurred by her, infancy is a bar. The plea of payment was properly abandoned.

These are the only questions; and they affect the liability of the wife alone. No question as to who is liable, if she be not, is directly in issue.

The marriage took place in September, 1862. At that time Mrs. Clayton was about eighteen; and up to that time she had from her childhood lived in her father's house as one of his family, and, as must be presumed in the absence of any statement to the contrary, upon the same terms as an unmarried daughter without property of her own usually lives under her father's roof, that is to say, at his expense.

The settlement was altogether of personal property of the husband, viz. 10,000*l.*, and 100*l.* a year for pin-money. It must be taken to have been a proper settlement, and such as was beneficial to the lady as well as the gentleman: and we should therefore feel little difficulty in dealing with the question of infancy, assuming that of retainer to be decided in favour of the plaintiffs.

The instructions for the settlement were given to the plaintiffs by the lady's father, who had occasionally previously employed them as his solicitors. At the time, he handed them the letter of the intended husband proposing the settlement, and referring to his solicitor.

A correspondence ensued between the plaintiffs and the solicitor named by the husband, in which each claimed the right to prepare

(a) *Willes, J., Byles, J., and Keating, J.*,—*Williams, J.*, having heard only a portion of the argument.

the settlement. In the \*end, they agreed to refer the matter to Mr. Cookson, who decided that beyond all doubt the practice in the profession is, the lady's solicitor should draw the settlements, adding that the gentleman should have the privilege of paying for them. [\*567]

Of the correctness of this opinion, as to settlements of personal property, such as that under consideration, no doubt was or properly could be suggested. Accordingly, the husband's solicitor gave way, and the settlement was prepared by the plaintiffs under the direction of the trustee named by the father on behalf of the lady; and it was executed by both the defendants previous to their marriage.

In allowing the settlement to be prepared by the plaintiffs, the husband's solicitor acted, it is true, without any positive or express authority from his client; but he did so in the exercise of a just discretion, and acting within the scope, as it appears to us, of his retainer to act for the intended husband, which involved an authority to do what was right and usual on his behalf in the business.

We think the reference by Captain Clayton to his solicitor cannot properly be construed as excluding the ordinary usage. Indeed, his employing a solicitor of his own in the first instance, if he thought the settlement was to be prepared by that gentleman, shows that he knew the expense was in some shape to fall upon himself. He might naturally employ a solicitor to see that the settlement, by whomsoever it was prepared, was properly expressed. His reference to "his solicitor, Mr. Charles Barnard," in his letter proposing the settlement, moreover, was of itself a warrant for the lady's friends to deal with Mr. Barnard as having authority, acting on his behalf, to do and consent to all that was right and usual in such a transaction; and no secret instructions could affect that *prima facie* \*authority. That Captain Clayton ought to pay the plaintiffs, therefore, [\*568] we entertain no doubt. And we further consider that the duty to do so is not merely an honorary obligation on his part, but also a legal liability arising out of the ordinary course of business, by which in such a case the solicitor employed on the part of the lady is to prepare the settlement, and the gentleman is to pay the bill.

In order to determine the present case, it will be necessary to consider in the first place the origin of this liability,—whether as upon an original liability of the husband to the solicitor, who is to be considered his for this purpose, or only as a liability to reimburse the expenses of the settlement which the lady or her father, or person standing in the place of a parent, may have incurred.

We think the latter to be the correct view. The employment of the lady's solicitor to prepare the settlement is not a mere compliment or matter of patronage: it has also the substantial object of satisfying the lady's friends that all proper care has been exercised on her behalf by some person in whom they confide, and of giving a remedy for negligence by action against the solicitor. He does not the less act as the solicitor of the lady or her parent, because the intended husband is to be ultimately liable, in the event of the marriage taking place.

The proper conclusion, therefore, is, that the retainer is to be considered as that of the lady or her parent, as the case may be, but that

usage makes the husband liable to indemnify whosoever on the part of the wife has properly incurred expense by retaining the solicitor to prepare a settlement in the propriety of which the latter has so large an interest.

\*569] This precise question is, as might be expected, bare \*of authority: but the ordinary case of a lease, which in practice is prepared by the landlord's solicitor, and paid for by the tenant, furnishes an analogy. In such a case, if the landlord pays, upon the default of the tenant, the former may upon the usage maintain an action against the latter for the money paid: *Grissell v. Robinson*, 3 N. C. 10 (E. C. L. R. vol. 32), 3 Scott 329.

Such was the nature of the action brought by Colonel Somerset in this case, to which there was no answer, if the retainer was by him on his own account, and not as agent on the behalf of his daughter.

That action was abandoned, upon the notion that in point of law the retainer was by Mrs. Clayton before her marriage, and that the claim therefore should be made in the present form.

From the above it follows that either the defendant was liable in the abandoned action, or that the defendants are liable in this. It further follows that the liability turns upon the question whether the work was done upon the retainer of Colonel Somerset as acting for himself or as agent for and on behalf of his daughter. In the former case, judgment for the defendants upon the ground that Mrs. Clayton is not liable, though Captain Clayton is. In the latter, judgment for the plaintiffs, upon the ground that Mrs. Clayton is liable.

The question upon which the decision of the case thus turns is one of fact, which a jury, upon ascertaining that Captain Clayton was at all events ultimately liable, would probably make short work of. The parties, however, have substituted the court for the jury; and we are bound to give a verdict upon that question of fact, in accordance, so far as the form of the question allows, with the merits of the case, and such as, if given by a jury, we should not have felt dissatisfied with or set aside as being contrary to the weight of evidence.

\*570] \*Now, the evidence to make out that Colonel Somerset was the proper and only client of the plaintiffs, was, his instructing them in person in the first instance, and naming the trustee, taken in connection with the fact that the young lady was a minor and a member of her father's family, living as to all ordinary wants at his expense.

The evidence to prove Mrs. Clayton liable, on the other hand, was, that the instructions were given by her father and by the trustee on her behalf, that, knowing, as she must have done, that a settlement was being prepared, she authorized and ratified those instructions by signing the settlement when prepared, and that after all she was the person most and principally interested.

The expense thus incurred was not part of the ordinary continuous outgoings for clothing, food, and such like, for which the paterfamilias would have the bills sent in to him as a matter of course. It was an occasion of a single and, though not extraordinary, exceptional character, in which it was unreasonable or improbable that the person to be chiefly benefited should incur a liability which the fact

of the marriage would transfer to the shoulders of the person who ultimately ought to bear it.

In these circumstances, we think it may justly be concluded that there was a retainer by Mrs. Clayton as a principal, through her father, who acted on her behalf as her agent, and disclosed his principal at the time.

Upon the remaining question, that of infancy, we have already stated our opinion. The principal contract of marriage was one which it was competent for an infant to enter upon. She had no property to settle, and would have had no certain provision without the settlement, and the preparation of the settlement \*was therefore [\*571] beneficial, as securing to her, at her election, a proper provision, which may justly be considered a necessary suitable to her estate and condition.

It would be a perversion of the law for the protection of infants, to hold that under these circumstances an infant could not contract for the preparation of such a settlement.

Whether the provisions in the settlement may be said absolutely to bind her, it is unnecessary to consider; because, so far as all other parties are concerned, she is thereby secured against want.

For these reasons, our judgment is for the plaintiffs.

Judgment for the plaintiffs.

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#### WALKER, Clerk, *v.* BROGDEN. Nov. 10.

It is no ground for changing the venue in an action for a libel contained in a local newspaper, that the defendant, the proprietor, possesses much influence in the county in which the venue is laid, and has since the commencement of the action evinced a disposition to exercise it to the plaintiff's prejudice.

But the court intimated that they would interfere if the defendant should before the trial publish anything in relation to the matter of the action reflecting upon the plaintiff.

THIS was an action of libel. The declaration stated that the defendant falsely and maliciously printed and published of the plaintiff, and of him as vicar of Bradney (which he then was), in a public newspaper called the Lincoln Gazette, the words following, that is to say, "Bradney. To the Editor. On Sunday morning last, accompanied by a few friends who were visiting with us, I attended our parish church. When I entered, there were only some eight or ten persons present, and, after having got comfortably seated, I saw our worthy Divine (meaning the plaintiff) escorting the school-mistress of Southrey up the aisle. After passing some twenty empty pews, his Reverence \*(meaning the plaintiff) halted at the one he had appropriated to my use in consequence of some dispute which had [\*572] occurred twelve months ago. I immediately rose, and requested him to show the lady into another pew; explaining to him that there were plenty of empty pews, and that, had we another introduced into our pew, we should be inconveniently full. 'Shure,' says he (meaning the plaintiff), 'get in now; ye'll get in here:' at the same time giving me a slight push. I remonstrated with him (meaning the plaintiff); telling him not to assault me in the church. 'Shure,' says he (meaning the plaintiff), 'I'll assault ye immediately.' I, not wishing for any disturbance with the gentleman (meaning the plaintiff), retired:

but, before I had got three yards from the pew, he (meaning the plaintiff) had laid his hands upon one young lady, and pushed her completely out of one particular corner, although there was ample room where I had been sitting, after I had left the pew. So thoroughly disgusted was I with his (meaning the plaintiff's) ungentlemanly and ridiculous conduct, that I left the church, as also did my friends. Surely there is some law to prevent such conduct to a churchwarden, or I shall use my best endeavours to obtain a sufficient sum of money to present him with something if he will resign, or at any rate make a tour and endeavour to find another specimen of humanity like unto himself, as it is a pity two places should be troubled with such a man. Let him (meaning the plaintiff) remain until we send for him again. JOHN R. MALTBY." "To the Editor. Our Vicar (meaning the plaintiff) has committed a slight mistake, in turning the churchwarden out of his own pew last Sunday morning. I may be wrong: but I think he (meaning the plaintiff) did. I can hardly reconcile his practice with his profession. He (meaning the \*573] plaintiff) \*professes to be a follower of the Great Apostle's example, and a successor of his Apostles in a direct line: but I think there must have been a link broken in the chain which connects our Divine (meaning the plaintiff) with our Apostle. He (meaning the plaintiff) professes to be moved by the Holy Ghost to preach the gospel; and there can be no doubt that he (meaning the plaintiff) was moved by the *spirit* when he came to the churchwarden, and turned him out of his place in a towering passion. Strange preparation for that solemn service! Is not the inconsistent conduct of the professed followers of Christ enough to make infidels of us all? The Church in all ages has suffered most from her professed friends. What is the use of a Bishop, if he cannot stop the vagaries of a Divine? CHURCHMAN." Claim 500l.

*Simon, Serjt.*, for the plaintiff, moved for a rule nisi to change the venue from Lincolnshire to London. A similar application had been made, but without success, to Keating, J., at Chambers. No affidavit was used on that occasion. The learned Serjeant now produced an affidavit of the plaintiff, in which he deposed as follows:—1. I am a clergyman of the Church of England, and for the last twelve years have been vicar of Bradney, in the county of Lincoln. 2. The defendant in this action is the registered printer and publisher, and is, I believe, the editor, of a newspaper called the Lincoln Gazette. 3. This action is brought by me against the defendant, for a libel published by him concerning me in the said newspaper of the 25th of June last, and which said libel was and is contained in two letters which appeared in the said paper on the said 25th of June last, and are the letters set out in the declaration. 4. Both such libels being \*574] not only entirely false, but malicious, my attorneys, by my \*direction, wrote to the defendant, and requested him to apologize for such libels, and to state who was the author of the libel signed "Churchman." 5. The defendant, instead of complying with such request, did, as I verily believe, immediately on receipt of such letter, go over to Bradney, and induce the said J. R. Maltby to take out a summons against me for the alleged assault mentioned and referred to in the said letters. One of the reasons for such belief is,

that such assault was alleged to have been committed ten days before the defendant received such letter from my attorneys, yet no summons was taken out by the said J. R. Maltby until after the defendant had received such letter: and the other of such reasons is, that the said J. R. Maltby stated on oath before the magistrates who heard the said summons, that one of his motives for taking out such summons was with a view to assisting the defence of this action, which it was expected would be commenced, or words to that effect. 6. The defendant after, as I so believe, having induced the said J. R. Maltby to take such proceedings, wrote to my attorneys, in answer to their said letter, that he understood that he (Maltby) had taken such proceedings, and that he the defendant should abide the result thereof; but he wholly refused or neglected to state who was the author of the letter purporting to be signed by a churchman, in which drunkenness was imputed to me in the church of which I am the vicar: whereupon this action was brought on the 18th of July; and the declaration was delivered on the 10th of August last. 7. The said summons was heard before the magistrates at the Wragley petty sessions on the 1st of September last, when the said J. R. Maltby and two witnesses called on his behalf were examined: but, being incompetent myself to give evidence, I was not then in a condition satisfactorily to rebut the \*evidence of the said J. R. Maltby and [\*575 his witnesses by the testimony of the witnesses whom I called: whereupon, the magistrates considering that the weight of evidence was on the side of the complainant, I was convicted, and fined 5*l*. 8. It was my intention and wish to appeal against the said conviction: but, upon consulting with my attorneys, and after taking counsel's opinion on the matter, was advised that I had no appeal against the said conviction. 9. I distinctly and positively say that I never assaulted the said J. R. Maltby, and that I was not and am not guilty of the conduct imputed to me in the said letters, and that the said libel is in every part of it wholly and utterly false. 10. A report of such hearing before the magistrates has been published in the Lincoln Chronicle, and various garbled and unfair reports have also been published by the defendant in his paper called the Lincoln Gazette, which is stated by him to be circulated extensively and generally throughout the county of Lincoln. 11. I verily believe that the defendant, in publishing the said libel, has been actuated solely by malice and by the desire and intention to injure and if possible to effect the ruin of my character; and my reasons for such belief, among others, are, that, in reference to an application lately made by my attorneys to Byles, J., on a summons for leave to amend the declaration in this action by altering the venue from Lincoln to London, the defendant has caused to be printed and published in his paper of the 29th of October last a paragraph as follows,—“Bradney. The Rev. William Walker again. This dear lover of litigation has been at his old work during the past week. Most people are aware that the Reverend gentleman has commenced an action against the proprietor of the Lincoln Gazette, for publishing a letter from Mr. Maltby, one of the churchwardens of the \*parish, affirming that he had been assaulted by the pious Divine in his own pew on a Sunday. Notwith- [\*576 standing that Mr. Walker was convicted by the magistrates and fined



51. for this very offence, he the other day endeavoured to prevail upon the court to allow the action to be tried in London. This motion was opposed by Mr. Tweed's agent; and the Reverend gentleman was defeated. Mr. Walker must therefore appear before those who are likely to know him best: and, if he is afraid of the verdict of a Lincolnshire jury, we think his case must be a weak one." 12. The said libel has been not only injurious to my personal character, but has seriously affected my influence, and has been and is highly detrimental to my ministrations as a clergyman; and, the said conviction being considered as a confirmation of the imputations contained in the said libel, great prejudice has been excited, and I believe exists in consequence against me throughout the county, as well as in the city of Lincoln, and in the said parish and neighbourhood. 13. Independently of the circumstances mentioned in the last paragraph, the defendant, by means of his said paper, which is extensively circulated as aforesaid, has excited and greatly increased, and, from the spirit which he has displayed, will, as I believe, continue to excite and increase the prejudice now existing against me, as in the last paragraph mentioned. 14. For the reasons and circumstances stated in this affidavit, it is of the utmost importance that I should have the earliest opportunity of vindicating my character, appearing myself as a witness, and showing before a jury that the said libel is wholly false and malicious, and that the evidence upon which I was convicted before the magistrates produced on the trial of this action was and is wholly unworthy of credit; for which purpose I am desirous of having the cause tried in \*Westminster or London at the sittings \*577] after this present Michaelmas Term; and, unless the venue be changed from Lincoln to London, it cannot be tried until the next Spring Assizes; and, for the reasons already stated, I verily believe that it could not be so fairly and independently tried at Lincoln as it would be in London.

The learned Serjeant submitted that it was obvious that the plaintiff's chance of having an impartial trial in the county of Lincoln was much impaired by the local influence which the proprietor of the Lincoln Gazette must necessarily possess, and which he seemed disposed to exercise so unscrupulously.

ERLE, C. J.—We are of opinion that there should be no rule. At the same time, we are well aware of the power of the local press, and that it may be exercised so as unduly to influence the jury on a trial of this sort. We therefore think it right to add to our refusal of the rule an intimation, that, if there should appear in the paper in question, at any time before the trial, any publication of a disrespectful character in relation to the matters involved in this action, the venue shall be immediately changed either by the court or by a judge at Chambers.

Rule refused.

**\*LINDLEY v. LACEY. Nov. 3. [578**

Upon a negotiation between the plaintiff and the defendant for the sale of the fixtures, furniture, and goodwill of a business (the agreement for which was afterwards reduced into writing), a distinct and separate promise was made by the defendant, in consideration of the plaintiff's signing the agreement, that he, the defendant, would settle an action then pending against the plaintiff at the suit of one C.:—Held, that evidence of this prior oral agreement was admissible, notwithstanding the written agreement contained an authorization to the defendant to settle C.'s action out of the purchase-money.

THE defendant, who had formerly occupied a coffee-house, No. 3, Agar Street, Strand, underlet the premises to the plaintiff, and sold him the furniture, fittings, and utensils therein. The plaintiff, having exhausted all his capital in the purchase of the business, and becoming embarrassed, and being sued by one Chase, to whom he had given an acceptance for 25*l.*, upon which he was being sued by Chase, applied to the defendant for assistance. The defendant thereupon promised, that, if the plaintiff would abstain from calling his creditors together (as he contemplated doing), and would induce the landlord of the premises to forbear to press for payment of the rent then due (and for which the defendant remained liable), he, the defendant, would settle Chase's action. Some further negotiation took place between the parties, and ultimately the defendant proposed to repurchase the furniture, fittings, &c., and retake the premises. This negotiation resulted in the following agreement being drawn up and signed by the plaintiff and defendant:—

"It is agreed by and between the parties hereto that Lindley shall sell and Lacey shall purchase of Lindley, all the furniture, fittings, fixtures, and utensils and other things now on the premises No. 3, Agar Street aforesaid, for the sum of 145*l.*, to be paid for on Lacey finding a customer and being paid for the property, or on his receiving the amount of life-policy, whichever event first happens; the said goods not to be considered as Lacey's property until the said sum of 145*l.* be paid to Lindley, but remain vested in Lindley until such sum of 145*l.* be paid, and be merely in \*Lacey's care on Lindley's behalf until paid for as aforesaid. In the mean time, Lindley [579 authorizes Lacey to settle the action Chase v. Lindley, and also to pay the rent now due to Mr. Phythian, such payments to be on account of the 145*l.* and form part of the same: but the whole of the goods to continue absolutely the property of Lindley until the sum of 145*l.* be satisfied. Lacey hereby releases Lindley from the tenancy of the premises from this day, and Lindley gives up to Lacey possession thereof. And it is declared by Lindley that he has full power and right to dispose of the goods to Lacey as aforesaid, that he has no judgment or encumbrance thereon which may vitiate the sale to Lacey; so that, on the amount of 145*l.* being satisfied, the goods shall then be the property of Lacey absolutely."

Before this memorandum was signed, the plaintiff said to the defendant, "Am I to understand that Chase's bill is to be settled? because that is the groundwork of the whole." To this the defendant replied, "Yes: I will see it settled:" and thereupon the plaintiff signed the agreement; and, in pursuance thereof the defendant took possession of the premises, but, failing to settle Chase's action, the goods were

seized under a *fi. fa.* and sold. For the breach of this oral agreement, amongst other things, this action was brought.

On the part of the defendant, it was objected at the trial, which took place before Erle, C. J., at the sittings at Westminster after last Easter Term, that the written memorandum did not contain any undertaking by the defendant to settle Chase's bill; and that evidence of a previous parol agreement could not be received, the bargain between the parties having been reduced into writing.

\*580] For the plaintiff it was insisted that it was \*competent to him to show that there was a prior oral agreement with regard to the settlement of Chase's action, which was collateral to and independent of the subsequent written agreement.

To this proposition his Lordship assented; and he left it to the jury to say whether or not there had been such an oral agreement as that relied on by the plaintiff. The jury found in the affirmative.

A verdict was thereupon entered for the plaintiff, damages 104*l.*, and leave was reserved to the defendant to move to enter a verdict for him, if the court should be of opinion that evidence of the prior oral agreement was not admissible, or to reduce the damages.

*Joyce*, in Trinity Term last, obtained a rule calling upon the plaintiff to show cause why a verdict should not be entered for the defendant; or why the verdict should not be reduced to 26*l.* on the money counts, subject to a set-off, on the grounds, amongst others, that there was no evidence to support any part of the plaintiff's claim under any count of the declaration,—that evidence of any oral bargain was not admissible, as the contract was subsequently reduced into writing,—that, if there was any agreement other than that reduced into writing, it was an agreement required by law to be in writing,—and that there was no sale other than that under the written contract.

*Hayes*, Serjt., and *Grantham*, now showed cause.—The question is whether there was a distinct and collateral verbal promise by the defendant to settle the action on Chase's bill; for, if there was, the plaintiff was not precluded by the subsequent written agreement from suing upon it. The argument that the written agreement overrides \*581] the oral one, is founded \*upon the assumption that the parties intended the former to express the whole bargain between them. The rule of law is clear, that a collateral oral agreement, whether prior to or contemporaneous with the written agreement, is not excluded, provided the two may consistently stand together. The rule is thus stated in Roscoe's *Nisi Prius*, 10th edit. 16,—“There are cases in which a parol agreement may exist between the parties to a written agreement on a matter collateral and superadded to it, so that both may well subsist together. In such cases, parol evidence of the collateral matter is admissible; for the original contract is unaffected by it. Thus, where the parties to an indenture of charter-party afterwards agreed by parol for the use of the ship at a period before the charter-party attached, parol evidence of this was held admissible in an action on this latter agreement,”—citing *White v. Parkin*, 12 East 578. In *Pym v. Campbell*, 6 Ellis & B. 370 (E. C. L. R. vol. 88), in an action on an agreement for sale, the plaintiff at the trial produced an agreement signed by the defendant. The latter thereupon gave evidence that the plaintiff and defendant, having

negotiated as to the purchase, agreed on the terms, and it was arranged that they and one A. should meet, and that, if A. approved of the property, they would make a bargain on those terms; that at the proposed meeting the plaintiff did not attend until A. had gone; that it was then arranged that the plaintiff and defendant should draw up and sign a memorandum of an agreement of sale, but that it should not be a bargain until A., on being consulted, approved; and that A. did not approve. The judge, upon this evidence, directed the jury to find for the defendant, if satisfied that it was arranged that the writing should be no agreement until A. approved: and it was held a right direction. So, in *Davis v. \*Jones*, 17 C. B. 625 (E. C. [\*582 L. R. vol. 84), it was held that parol evidence was admissible to show that a written contract, which had no date, was not intended to operate from its delivery, but from a future uncertain period. "A written instrument," said Jervis, C. J., "does not necessarily operate from delivery: it is competent to a party to show that it was delivered as an escrow, and that, though it appears upon the face of it to be presently operative, it was in reality not intended to operate until the happening of a given event. That was expressly decided in *Murray v. The Earl of Stair*, 2 B. & C. 82 (E. C. L. R. vol. 9), 3 D. & R. 278. It was perfectly competent to the plaintiff,—the agreement being silent on the subject,—to show by parol testimony that it was not intended to take effect until the happening of something else." To the same effect is *Harris v. Rickett*, 4 Hurlst. & N. 1. There, a trader, being indebted to various persons, procured from A. an advance of 200*l.*, for which he verbally agreed to give a bill of sale of all his property, if called upon to do so. On receiving the advance, he gave to A. a promissory note for 200*l.*, a memorandum of agreement to assign some property expectant on the death of his wife's father, together with a policy of insurance, and also another memorandum of agreement to pay 10*l.* yearly as bonus. At a later period, on being requested, he executed a bill of sale of all his property to A.: and it was held that evidence of the original verbal agreement was admissible, inasmuch as the subsequent written agreement did not contain and was not intended to contain the whole agreement between the parties. Again, in *Green v. Saddington*, 7 Ellis & B. 503 (E. C. L. R. vol. 90), the plaintiff and defendant agreed by word of mouth that the plaintiff should pay 37*l.* for the interest of the defendant in premises occupied by him as a slaughter-house, and for the fixtures; the defendant to return 10*l.* if the \*plaintiff were refused a license to use the premises as a [\*583 slaughter-house. The premises and fixtures were transferred to the plaintiff, and the defendant received the 37*l.* The action was afterwards brought to recover 10*l.* on an allegation that the license to use the premises as a slaughter-house had been refused to the plaintiff. A nonsuit was directed, on the ground that the contract was for an interest in land, and was void under the 4th section of the Statute of Frauds. Upon a rule to set aside the nonsuit, it was held by Wightman, J., and Erle, J. (Crompton, J., not concurring), that, the contract being executed as far as regarded the land, and the promise sued on relating wholly to money, the plaintiff might recover, though the contract was not in writing. [KEATING, J.—The principle you are contending for was recognised in a still more recent case in

this court,—*Wallis v. Littell*, 11 C. B. N. S. 369 (E. C. L. R. vol. 103). There, the plaintiff declared upon an agreement by the defendant to transfer to him a farm which he (the defendant) held under Lord Sydney, “upon the terms and conditions of the agreement under which the same was held by the defendant under Lord Sydney.” The defendant pleaded that the agreement declared on was made subject to the condition that it should be null and void if Lord Sydney should not within a reasonable time after the making of the agreement consent and agree to the transfer of the farm to the defendant: and it was held that it was competent to the defendant to prove by extraneous evidence this contemporaneous oral agreement,—such oral agreement operating as a suspension of the written agreement, and not in defeasance of it. In giving judgment, Erle, C. J., said: “In *Pym v. Campbell*, 6 Ellis & B. 370 (E. C. L. R. vol. 88), and *Davis v. Jones*, 17 C. B. 625 (E. C. L. R. vol. 84), it was decided that an oral agreement to the same effect as that relied on by the defendant might be admitted, \*without infringing the rule that a \*584] contemporaneous oral agreement is not admissible to vary or contradict a written agreement. It is in analogy with the delivery of a deed as an escrow; it neither varies nor contradicts the writing, but suspends the commencement of the obligation.” BYLES, J.—All these cases proceed upon the principle that extraneous evidence is always admissible to *apply* the agreement.] Procuring the landlord’s forbearance here was ample consideration for the defendant’s promise to meet Chase’s bill.

*Joyce* (with whom was *Hawkins*, Q. C.), in support of the rule.—This was a bargain for the sale of goods above the value of 10*l.*; it was a contract concerning an interest in land; and it was an engagement to pay the debt of another: there were three reasons, therefore, why it should be in writing. The whole was clearly one agreement. The circumstance of Lindley having been sued by Chase was the whole foundation and motive for the negotiation. [BYLES, J.—The jury have found that there was such a collateral agreement as suggested. The only question for us is, whether there *can* be such an agreement in point of law.] The supposed oral agreement was only a part of the agreement between the parties, which by law must be in writing. It was plainly contemplated that the payment of Chase’s bill was to be taken as part payment of the purchase-money for the fixtures, furniture, and good-will of the premises: it is so stipulated in the agreement itself. It might be that Lacey never would become liable to pay the 145*l.* at all. All was conditional. None of the cases referred to have any bearing upon the question raised here.

ERLE, C. J.—I am of opinion that this rule ought to be discharged. \*585] The plaintiff and the defendant had a \*treaty respecting the sale of certain goods from the former to the latter. That treaty originated in an action brought by one Chase against the plaintiff as the acceptor of a bill of exchange for 25*l.* which became due on the 16th of June, 1863, in which Chase had signed judgment and was about to issue a *fi. fa.*, under which the goods which were the subject of this action would have been seized. As this would have destroyed the good-will of the plaintiff’s business, which the defendant was desirous of preserving, the latter proposed and it was ulti-

mately agreed *in writing* that the goods should be sold to the defendant upon certain terms of credit. At the time of the negotiation there was a distinct collateral verbal agreement between the plaintiff and the defendant for something to be done before the sale of the goods by the plaintiff to the defendant should be carried into effect, viz., that the defendant should pay the acceptance in the hands of Chase and so stay the action of *Chase v. Lindley*. This was a thing which was totally collateral and distinct from the agreement for the sale of the goods and the transfer of the possession of the premises. The jury found that that which the plaintiff deposed to as to the preliminary treaty was a true representation of the transaction, viz., that there was a distinct collateral agreement by the defendant that he would take up the bill if the plaintiff would forbear from calling his creditors together, and would persuade the landlord not to press for payment of the rent, for which the defendant remained liable. The words used were perfectly clear to that effect. The defendant said, "I will repurchase the goods, and I will see Chase's matter made right." On a subsequent day, there was a treaty between the parties as to the amount to be paid for the goods; and it was ultimately settled upon the terms contained in the written memorandum. Before signing that agreement the plaintiff said to the defendant,— [\*586 "Am I to understand that Chase's bill will be settled, for that is the ground-work of the whole?" To which the defendant replied, "Yes: I will see it settled:" and thereupon the agreement was signed. Taylor, a witness who was present at the time, corroborated the evidence of the plaintiff. I think, therefore, the intention of the parties was, that this settlement of Chase's bill should form the subject of a distinct collateral promise,—a preliminary matter to be done at once. I take it to be substantially the same as if, the agreement for the sale of the goods being before them, Lacey had said to Lindley, "In consideration of your signing that agreement, I will settle Chase's action." A long stream of cases has been referred to by my Brother Hayes: but they all reduce it to a question of fact, as does almost every case which turns upon the construction of a written contract. If the instrument shows that it was meant to contain the whole bargain between the parties, no extrinsic evidence can be admitted to introduce a term which does not appear there. But, if it be clear that the written instrument does not contain the whole, and the jury find that there was a distinct collateral verbal agreement between the parties, not inconsistent with the written contract, the law does not prohibit such distinct collateral agreement from being enforced. In some of the cases,—as in *Harris v. Rickett*, 4 Hurlst. & N. 1,—there was a prior verbal agreement. In *Davis v. Jones*, 17 C. B. 625 (E. C. L. R. vol. 84), the oral and the written agreement were contemporaneous. So, in *Wallis v. Littell*, 11 C. B. N. S. 369 (E. C. L. R. vol. 103), there was a contemporaneous oral agreement that the farm was not to be transferred unless Lord Sydney consented to accept the plaintiff as his tenant. It is clear, therefore, that, if there be a distinct collateral oral agreement between the [\*587 parties, it is immaterial whether it precedes or is contemporaneous with the written agreement. I think it is clear from the evidence here that there was a distinct collateral agreement that

Chase's action should be settled by the defendant, and that evidence of that agreement, which was perfectly consistent with the written agreement, was admissible. The rule, therefore, will be discharged.

BYLES, J.—I am of the same opinion. I think there was a prior collateral oral agreement relating to the bill, which the subsequent written agreement did not in any manner interfere with. The written agreement is altogether silent as to the payment of that bill: and there is nothing therein which is at all inconsistent with the prior agreement. The case of *Harris v. Rickett*, 4 Hurlst. & N. 1, seems to me to be precisely in point. But, independently of that, it appears that the original agreement between the parties was, that the bill in the hands of Chase should be taken up by Lacey; and that was to be the ground-work of the subsequent arrangement. That being so, *Pym v. Campbell*, 6 Ellis & B. 370 (E. C. L. R. vol. 88), *Davis v. Jones*, 17 C. B. 625 (E. C. L. R. vol. 84), and two recent cases in this court, viz., *Wallis v. Littell*, 11 C. B. N. S. 369 (E. C. L. R. vol. 103), and another which has not been referred to, show that evidence may be given of a prior or a contemporaneous oral agreement which constitutes a condition upon which the performance of the written agreement is to depend. If evidence may be given of an oral agreement which affects the performance of the written one, surely evidence may be given of a distinct oral agreement upon a matter with respect to which the subsequent written agreement is altogether silent: more especially if, as here, in addition to its being a stipulation, it was also a condition. The justice of the case is evidently in accordance with our view of the law.

\*588] \*KEATING, J.—I am of the same opinion. The question is whether the facts show that it was the intention of the parties to make a distinct collateral agreement such as the jury have found. It seems to me that the facts do most strongly show that such was their intention. The first intention of the plaintiff was to call his creditors together. The defendant had a strong interest in preventing that, seeing that he was liable to the landlord for the rent of the premises; and therefore he proposed to repurchase the fittings, fixtures, and furniture from the plaintiff. The latter, however, declined to enter into any arrangement unless the bill upon which Chase was suing him was first paid. This the defendant agreed to do: and that of necessity was an agreement which was preliminary and collateral to the written agreement, which was then allowed to proceed. I think the jury came to a right conclusion; and that the law enables us to sustain it. Rule discharged.

### MALLAN v. RADLOFF. Nov. 11.

1. A., after inspection of the separate parts, bought of B. soap-frames which were by the contract warranted to be "new frames, with all nuts and bolts complete and perfect." In an action for a breach of this warranty, the declaration alleged that the plaintiff warranted the frames to be fit for the purpose of making soap: and at the trial it was proved, and found by the jury, that, though new, and having the proper number of nuts and bolts, the frames were not reasonably fit for the purpose of making soap:—Held, that the evidence sustained the declaration.

2. Upon the sale of an ascertained article, a known machine, the component parts of which

have been inspected by the buyer,—*Quære*, whether there is any implied warranty that the thing is fit for the purpose for which it professes to have been constructed?

THIS was an action brought by the plaintiff, a soap manufacturer, against the defendant, an oil-refiner, to recover damages for the breach of an alleged warranty on the sale of certain soap-frames.

\*The declaration stated that the defendant, by warranting [\*589 that certain soap-frames were then fit and proper to be used for the purpose of making or manufacturing soap, sold the same to the plaintiff to be used for the purpose aforesaid: yet that the said frames were not then fit and proper to be used for the making or manufacturing soap; whereby the plaintiff, after having used the said frames in the making or manufacturing of soap, suffered great loss and damage, and the soap of the plaintiff was spoiled and rendered useless, and the plaintiff was prevented from carrying on his business as a soap-manufacturer for three weeks, and was obliged to buy new soap-frames, and to remove at great expense the soap-frames which he had bought of the defendant: Claim, 100*l*.

The defendant pleaded,—first, that he did not sell to the plaintiff the said soap-frames, as alleged,—secondly, that he did not warrant, as alleged,—thirdly, that, at the time of the alleged warranty, the said soap-frames were fit and proper to be used for the purpose of making or manufacturing soap. Issue thereon.

The cause was tried before Keating, J., at the sittings at Westminster after last Term. The facts which after some controversy were ultimately established were as follows:—The plaintiff was a soap-maker, and the defendant a person engaged in the oil trade. The latter being possessed of certain soap-frames, some of which were old and some new, and having no use for them, was desirous of selling them. One Lazarus, the foreman of the plaintiff, a person skilled in the manufacture of soap, having learned through a plant-broker that these frames were for sale, went to the defendant's premises, on the 14th of February last, for the purpose of inspecting them. The frames not being put together, Lazarus inspected the various disjointed parts, \*and on the following day the defendant received [\*590 from the plaintiff the following letter:—

“St. Luke's Soap Works,  
“63, Golden Lane.

“Mr. Radloff.

“Sir,—Please send to the above address the six new iron frames which were seen yesterday, on the following condition, viz. they are to be *warranted new frames, with all nuts and bolts complete*, and to be delivered free of expense on Monday next, between 12 and 2 o'clock. Please send a receipt for 24*l*., as cash will be sent on delivery.

“Pro J. MALLAN, C. B. FOSBROKE.”

The frames were accordingly sent, accompanied by an invoice and receipt in the following form,—

“London, Feb. 15, 1864.

“Mr. J. Mallan bought of Mr. Arton

“Six new soap-frames, with bolts and screws complete and perfect . . . . . 24 0 0  
“2½ per cent. discount . . . . . 12 0

£23 8 0



At the foot of the invoice was the following receipt,  
 "Paid at same time to W. Arton. 23l. 8s."

The evidence showed that the frames were new, and had all the bolts and nuts complete; but that, when put together at the plaintiff's works, it was found that the joints were so ill fitted that they would not contain the liquid soap, and so the plaintiff sustained great loss. One of the defendant's witnesses, however, stated, that, though not adapted for the making of soap such as the plaintiff made (which was unusually thin), the frames were quite sufficient for the manufacture of ordinary soap.

\*591] There was contradictory evidence as to whether or \*not the words "and perfect" had been interlined in the invoice after the completion of the bargain.

On the part of the defendant, it was submitted, that, assuming the words "and perfect" were part of the bargain, they made no difference; for that the warranty, if any was to be implied from the circumstances, was performed by the delivery of the articles which the plaintiff's foreman had inspected, with all the bolts and nuts complete.

The learned judge left it to the jury (subject to the question of law, upon which the defendant had leave to move) to say whether the invoice was part of the contract,—whether, looking at all the circumstances, the word "complete" meant having the requisite number of bolts and nuts, or, as alleged in the declaration, "fit and proper for the manufacture of soap,"—whether the words "and perfect" were part of the contract of warranty at the time of the bargain,—whether the warranty was broken,—and what damages the plaintiff had sustained by the breach.

The jury found that the words "and perfect" formed part of the contract, that there was a warranty as alleged, and that it was broken; and they assessed the damages at 30l.

*Digby Seymour*, Q. C., on a former day in this term, obtained a rule calling upon the plaintiff to show cause why a verdict should not be entered for the defendant, pursuant to the leave reserved, on the ground that the warranty proved did not support the warranty as laid in the declaration. He referred to *Chanter v. Hopkins*, 4 M. & W. 399, and *Ollivant v. Bayley*, 5 Q. B. 288 (E. C. L. R. vol. 48), 1 D. & Meriv. 373.

*Petersdorff*, Serjt., and *Kenealey*, showed cause.—The sole question \*592] is, whether the declaration is supported \*by the evidence. The documents, it is submitted, established an express warranty on the part of the defendant that the soap-frames sold were complete and perfect, and fit for the purpose for which they were sold, viz. the making of soap. In truth, the evidence imposed upon the defendant a more extensive obligation than that alleged in the declaration. The defendant professed to sell soap-frames with bolts and screws complete and perfect. That must necessarily mean fit,—reasonably fit,—for the purpose for which they were bought. [BYLES, J.—The difficulty is, that the plaintiff got the specific articles which he bought, after they had been inspected by his foreman. The question is, whether, under such circumstances, there is an implied warranty that the frames were fit for the making of soap.] This was not a purchase of an article of which the buyer could form a correct judgment upon

a mere inspection. [KEATING, J.—The frames, when seen by the plaintiff's foreman upon the defendant's premises, were in pieces. Their fitness for the purpose of making soap could not be judged of until they were put together upon the premises of the plaintiff.] The things sold were soap-frames, and they were warranted complete and perfect. This they could not be, unless they could be used for the purpose of making soap. In *Jones v. Bright*, 5 Bingh. 533 (E. C. L. R. vol. 15), 3 M. & P. 155, on a sale of copper-sheathing, it was held that there was an implied warranty that the article was fit for sheathing ships. [BYLES, J.—There, the defendant was the manufacturer of the article: that case has no application here. ERLE, C. J.—Where the contract is for a known article, to be made, the seller is bound to furnish a thing which is reasonably fit for the purpose to which such an article is known to be intended to be applied: *Brown v. Edgington*, 2 Scott N. R. 496, 2 M. & G. 279 (E. C. L. R. vol. 40); *Shepherd v. Pybus*, 3 M. & G. 868 (E. C. L. R. vol. 43), 4 Scott N. R. 484.]

\**Digby Seymour*, Q. C., and *J. A. Russell*, in support of the [\*593 rule.—This was a sale of a specific and ascertained article, of which the plaintiff by his foreman had such inspection as he deemed sufficient. The case, therefore, falls precisely within *Chanter v. Hopkins*, 4 M. & W. 399, where it was held, that, upon such a sale, no warranty can be implied. Lord Abinger, in delivering judgment, there says,—“I agree with the authority which Mr. Byles has referred to, of *Jones v. Bright*, 5 Bingh. 533 (E. C. L. R. vol. 15), 3 M. & P. 155, that, if an order is given for an *undescribed and unascertained* thing, stated to be for a particular purpose, which the manufacturer supplies, he cannot sue for the price, unless it does answer the purpose for which it was supplied. The case may be illustrated by the example which has been already referred to. Suppose a party offered to sell me a horse of such a description as would suit my carriage; he could not fix on me a liability to pay for it, unless it were a horse fit for the purpose it was wanted for: but, if I describe it as a particular bay horse, in that case the contract is performed by his sending that horse; and it appears to me that the present is a similar case. The order is,—‘Send me your patent hopper and apparatus, to fit up my brewing-copper with *your smoke-consuming furnace*.’ The purchase is of a defined and well-known machine. The plaintiff has performed his part of the contract by sending that machine; and it is the defendant's concern whether it answers the purpose for which he wanted to use it or not.” That doctrine was acted upon by this court in *Prideaux v. Bunnett*, 1 C. B. N. S. 613 (E. C. L. R. vol. 87), and also by the Court of Queen's Bench in *Ollivant v. Bayley*, 5 Q. B. 288 (E. C. L. R. vol. 48), 1 D. & Meriv. 373. In *Rigge v. Parkinson*, 6 Hurlst. & N. 955, the plaintiffs having entered into an agreement with the East India Company for the conveyance of troops to Bombay, the \*defendant undertook to supply the plaintiffs with troop stores [\*594 “guaranteed to pass survey of the East India Company's officers;” and it was held by the Exchequer Chamber that this express warranty did not exclude the warranty implied by law that the stores should be reasonably fit for the purpose for which they were intended. That, however, was the case of an unascertained article: and the judgment of Cockburn, C. J., well exemplifies the rule. “The

principle of law," says his Lordship, "is correctly stated in the passage cited from Chitty on Contracts, 6th ed. p. 399,—Where a buyer buys a specific article, the maxim 'caveat emptor' applies: but, where the buyer orders goods *to be supplied*, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose." Here, the purchase was of specific articles: the buyer did not trust to the judgment of the seller. This is the case of an express warranty: and none other can be implied. What is the meaning of the warranty into which the defendant entered? That these soap-frames should be complete with all bolts and screws,—and also, if you will, perfect. [ERLE, C. J.—It is *found* that they are not fit for the making of soap.] The defendant did not warrant them fit for that purpose: he was not a maker of or dealer in soap-frames. All he warranted, was, that the frames were new, and that they were complete, with all bolts and screws. [ERLE, C. J.—Can a soap-frame be said to be perfect or complete which will not hold soap? These were not in the condition of "soap-frames" when they were inspected by the plaintiff's foreman; but the elements or component parts of soap-frames, upon which no judgment could on the mere view be formed. There *was* a case of *Parsons v. Sexton*, 4 C. B. 899 (E. C. L. R. vol. 56), where a breach of warranty was relied on, where there had been a sale of a specific engine which had been inspected by the buyers' foreman while lying unerected and in pieces.] That case is singularly like the present. The contract there was contained in a proposal by the plaintiff, and an acceptance by the defendants, in the following terms:—"I, James Parsons, do hereby agree to provide a fourteen-horse engine and sixteen-horse boiler, with fittings and everything complete, for the sum of 260*l*., and to deliver and erect the same at the mill of Messrs. Sexton & Co., and to set the same to work: to be complete in a workman-like manner on or before the 1st of October next," &c. That proposal was accepted in the following terms,—“In consideration of your supplying us with *a certain fourteen-horse engine which our foreman has inspected*, and putting the same in thorough repair, and supplying a new sixteen-horse boiler, commonly called a Cornish boiler, with fire-place, valves, steam-cocks, and gauges complete, and delivering and erecting the whole, and setting the whole at work, according to the undertaking signed by you and left with us, we agree to pay for the same 260*l*.” &c. The narrative of the facts and the conclusion of law, as they appear in the judgment of the court, are as follows:—"After some correspondence about the engine, the defendants' foreman went over to inspect it: and, although it was not then put up, but was in different pieces,—as it had been removed from Gresley's premises, where it had been at work,—yet the whole of the engine was there, and the foreman had as good an opportunity of forming a judgment respecting it, as if it had been put together. Then, the plaintiff offered to provide a fourteen-horse engine, put it in repair, and find all fittings, &c., and a sixteen-horse boiler, for 260*l*. The defendants, in answer, *agree* to take on these terms *the fourteen-horse engine which their foreman had inspected*. The evidence showed that the fittings were not part of the engine. Upon this state of facts, we think that the

defendants bargained for and bought the specific engine which was afterwards erected on their premises: and, assuming that there was a warranty as to its power, and that the warranty was broken, that was no answer to the action, according to *Street v. Blay*, 2 B. & Ad. 456 (E. C. L. R. vol. 22). The case of *Chanter v. Hopkins*, 4 M. & W. 399, also establishes, that, where a known and ascertained article is ordered and sent, it must be paid for, although it do not answer the purpose for which it was ordered: and *Ollivant v. Bayley*, 5 Q. B. 288 (E. C. L. R. vol. 48), 1 D. & Meriv. 373, is to the same effect. The defendants, then, could not reject the engine because it was not of fourteen-horse power; and the direction of the learned judge in that respect was wrong." So, here, this was in fact and in law a sale of a specific and ascertained article, which the purchaser had an opportunity of inspecting before the purchase, and which consequently he had no right afterwards to reject. In *Budd v. Fairmaner*, 8 Bing. 48 (E. C. L. R. vol. 21), 1 M. & Scott 74, the proof of a warranty upon the sale of a horse was contained in the following memorandum,—“Received of B. 10*l*. for a gray four-year-old colt, warranted sound:” and it was held that the warranty was confined to soundness, and that, without proving fraud, it was no ground of action that the colt was only *three* years old. Tindal, C. J., there said: “In this case a written instrument was produced by the plaintiff to show the nature of the contract between him and the defendant, and we are to interpret that instrument, like all others, according to the intention of the parties. The instrument appears to be a receipt for 10*l*. ‘for a gray four-year-old colt, warranted sound.’ I should say, that, [\*597] upon the face of this instrument, the intention of the parties was, to confine the warranty to soundness, and that the preceding statement was matter of description only. And the difference is most essential. Whatever a party warrants he is bound to make good to the letter of the warranty, whether the quality warranted be material or not; it is only necessary for the buyer to show that the article is not according to the warranty: whereas, if an article be sold by description merely, and the buyer afterwards discovers a latent defect, he must go further, allege the scienter, and show that the description was false within the knowledge of the seller. And, where there is an express warranty as to any single point, the law does not beyond that raise an implied warranty that the commodity sold shall be also merchantable.” [BYLES, J.—Suppose the defendant had said at the time of the contract, “I sell you these *good* soap-frames,” would that have been more than simplex commendatio?] It is submitted not. Upon principle, as well as upon authority, there is no pretence for saying that the evidence here supported the charge in the declaration. The description of the article was not wrong. These were soap-frames. They were new. And they were furnished with all bolts and screws complete. [ERLE, C. J.—They were soap-frames to the eye; but they were found when put together to be incapable of being used as soap-frames.]

ERLE, C. J.—This was an action upon a contract by the purchaser of certain soap-frames against the vendor. The plaintiff in his declaration alleged that the vendor contracted that the frames were fit for the purpose of making soap. The jury found a verdict for the plain-

tiff, on the ground that the soap-frames were not fit for the purpose of making soap: and the defendant \*has moved to set aside \*598] the verdict, and to enter it for him, on the ground that there was no evidence to justify the finding of the jury that the soap-frames were so warranted. It appeared that the plaintiff was a soap-maker, and the defendant an oil-refiner, who had become possessed of some soap-frames for the purpose of entering upon the manufacture of soap, which he had contemplated; that the plaintiff's foreman called at the defendant's premises, and there saw the pieces of metal which when fitted together would constitute the soap-frames; and that, after the foreman had inspected the constituent parts, the plaintiff ordered them to be sent to his premises, on condition that they were "warranted new frames with all nuts and bolts complete and perfect," and accepted and paid for them: and it was found by the jury that these latter words were part of the contract. The question is, whether these facts support the allegation in the declaration that the defendant warranted the soap-frames to be fit and proper to be used for the making or manufacturing of soap. I am of opinion that they do. The construction of every contract depends upon the intention of the contracting parties as it is to be gathered from the language they have used. In making the bargain, the seller used words upon which the buyer acted,—“I warrant the soap-frames to be new, and with nuts and bolts complete and perfect.” Can it be said that the buyer ever intended to have soap-frames which would not make soap, but would allow the material to run out and be lost? I think it is obvious from the use of the words “perfect soap-frames,” and must be assumed, that the parties were contracting for a sale and purchase of frames fit to be used in the making of soap. Those words, coming after the words “warranted new and complete,” import something more than that the frames shall \*599] be new and complete \*in structure. The governing rule for the construction of all contracts, is, that they shall be read so as if possible to effectuate the intention of the parties: and I think these parties could have had no other intention than such as I have above suggested. As to the case of *Budd v. Fairmaner*, 8 Bingh. 48 (E. C. L. R. vol. 21), 1 M. & Scott 74, it may very well be that there was some known usage in regard to the sale of horses; otherwise I should protest against the words of a contract not receiving their ordinary interpretation, by reason of their collocation in the instrument in which they are found. Effect should be given if possible to every word of the contract. In *Behn v. Burness*, 3 Best & Smith 76 (E. C. L. R. vol. 113), 32 Law J. Q. B. 204, my learned Brother Williams brought together a great many cases to show where words may be considered as surplusage, and where an operative part of the contract, and where a condition makes the contract void if not complied with.(a) A reference to that case very much confirms my mind in the conclusion to which I have arrived. A great deal has been said by Mr. Russell as to the articles in question having been ascertained by inspection. No doubt, where the subject-matter of the contract is ascertained, by inspection or otherwise, the sale is subject to different incidents from the case of a sale of an unknown and unascertained

(a) And see *Bannerman v. White*, 10 C. B. N. S. 844 (E. C. L. R. vol. 100).

chattel. One instance is the case of *Ollivant v. Bayley*, 5 Q. B. 288 (E. C. L. R. vol. 48), 1 D. & Meriv. 373. There, the plaintiff was the patentee and manufacturer of a patent machine for printing in two colours. The defendant saw the machine on the plaintiff's premises, and ordered one, the plaintiff undertaking by a written memorandum to make him "a two-colour printing-machine on my patent principle." In an action for the price, the defendant sought to excuse himself from liability, on the ground that the machine had been \*found use- less for printing in two colours. The learned judge, in sum- [\*600 ming up, told the jury, that, if the machine described was a known, ascertained article ordered by the defendant, he was liable, whether it answered his purpose or not: but that, if it was not a known, ascertained article, and the defendant had merely ordered and the plaintiff agreed to supply a machine for printing two colours, the defendant was not liable unless the instrument was reasonably fit for the purpose. It was held that this was a proper direction; and, the jury having found for the plaintiff under it, the court refused to disturb the verdict. Where the sale is of a specific and ascertained article, the property passes by the sale; and, if there be any stipulation in the contract which is not complied with, the buyer cannot on that account repudiate it, but must bring his action for such breach. If the plaintiff here had attempted to repudiate the contract on the ground that the frames did not answer the description, perhaps Mr. Russell might have succeeded in showing that the sale was of an ascertained article, and therefore the plaintiff's only remedy was by an action for the breach of contract. I say perhaps, because I wish to reserve to myself the consideration of the case where the subject of the contract is a machine, and the inspection has been, not of the machine itself, but only of the several parts which when put together will constitute the machine. If the component parts were of such a nature that a skilful person could by the mere inspection of them in that condition tell the quality and condition of the machine when put together, I incline to think it might be treated as a sale of an ascertained article, according to the authority of *Parsons v. Sexton*, 4 C. B. 899 (E. C. L. R. vol. 56), by which I should probably feel myself governed. But this is an action for the breach of a stipulation in the contract which goes beyond the name of the article: the [\*601 \*frames are warranted complete and perfect. The sale of a horse may be and commonly is subject to additional stipulations as to soundness and the like: so, soap-frames may be sold subject to an additional stipulation such as is found here: and I am very clear that such additional stipulation, if found in the contract, is affected by the circumstance of whether the subject-matter of the sale is an ascertained or an unascertained article. Here, there is that additional stipulation, and that affords ground enough for disposing of this rule.

BYLES, J.(a)—I am of the same opinion. I go a long way with Mr. Russell in his very able argument: but I think he deceived himself in the place where he inserted the words "complete and perfect." They are not found in that part of the contract which relates to matter

(a) Willes, J., had heard only a portion of the argument, and therefore gave no opinion.

of description, but in that part which contains the warranty. Reading the two documents (the letter and the invoice) together, the contract reads thus,—Send me the six new soap-frames which were seen yesterday, on the following conditions, viz., they are to be warranted new frames, with all nuts and bolts, and to be delivered complete and perfect. The question of implied warranty does not arise here: it is a case of express warranty. That consists of two words. The soap-frames are to be new, they are to be complete, with all nuts and bolts, and they are to be perfect. The rule for the construction of contracts is, that every word shall have effect if possible. The word “perfect” implies either moral or physical or mechanical perfection. Here we have to deal with mechanical perfection. The word “perfect” imports something more than mere goodness of quality. I must own I \*602] \*entertained a different opinion at first; but I now entertain no doubt whatever that the construction which my Lord has put upon the contract is the true one.

KEATING, J.—I am of the same opinion. At the trial, I entertained considerable doubt as to how far the warranty alleged in the declaration was established by the evidence offered on the part of the plaintiff. But, after the able argument of Mr. Russell, I no longer doubt that there was good evidence to go to the jury in support of the warranty as alleged, and that the warranty has been broken. It seems to me that the documents upon which the warranty rests are capable of the construction which my Brother Byles has put upon them. I entirely agree with him that the word “perfect” removes any doubt which might have arisen if the word “complete” only had been found in the contract, and does import that these soap-frames were of such a description as to be capable of being used for the making of soap. The jury found that they were not capable of being so used. Under these circumstances, I agree with my Lord and my Brother Byles that this rule should be discharged. Rule discharged.

\*603]

\*FRAY v. FRAY. Nov. 21.

The plaintiff declared upon a letter written by the defendant, in which it was alleged that the former had for years, without cause, systematically done everything to annoy the latter, and had unnecessarily dragged him into the Court of Chancery and put him to great expense:—Held, on demurrer, that the court could not so clearly see that the letter could not be libellous, as to justify them in withdrawing the case from a jury.

THIS was an action for a libel. The declaration stated that the defendant falsely and maliciously wrote and published of the plaintiff, in the form of a letter addressed to the clerk to the guardians of a certain poor-law union, in respect of an allowance by the said guardians towards the maintenance of his, the defendant's mother, being also the mother of the plaintiff, the words following, that is to say, “I (meaning the defendant) do not know what grounds she (meaning the said mother of the plaintiff and the defendant) can have to claim off your board out-door relief. You will find that she (meaning the said mother of the plaintiff and the defendant) does not belong to your parish: in fact, Mr. Phillips, your relieving officer, informed me

(meaning the defendant), by letter, more than twelve months ago, that her (meaning the plaintiff's and defendant's said mother's) parish was Llanfair, Waterdine, Salop, a more fitting place for her (meaning the plaintiff's and defendant's said mother) to end her days than Newtown; but her removal would not suit Miss Fray's (meaning the plaintiff's) purpose. Again, I (meaning the defendant) say, if she (meaning the plaintiff's and the defendant's said mother) is a pauper, she (meaning the plaintiff's and defendant's said mother) is not justified in renting a cottage and paying rates and taxes. It is only done to keep a home for Miss Fray (meaning the plaintiff), who (meaning the plaintiff) has for years, without the slightest cause, systematically done everything she (meaning the plaintiff) can to annoy me (meaning the defendant): and I (meaning the defendant) am sorry to say my mother (meaning the said \*mother of the plaintiff and the defendant) is only too glad to assist her (meaning the plaintiff). Some [\*604 years ago, they (meaning the plaintiff's and the defendant's said mother and the plaintiff) dragged me (meaning the defendant) into Chancery, as well as Mr. Drew: and almost every term I (meaning the defendant) am obliged to appear by counsel before the Vice-Chancellor. They (meaning the plaintiff's and the defendant's said mother and the plaintiff) had no business to include me (meaning the defendant) in the bill, as I (meaning the defendant) make no claim to my (meaning the defendant's) late father's property; but, of course, it is a pleasure to my mother (meaning the plaintiff's and the defendant's said mother) and Miss Fray (meaning the plaintiff) to put me (meaning the defendant) to all the expense they (meaning the plaintiff's and defendant's said mother and the plaintiff) can. My (meaning the defendant's) solicitor has had notice to appear again in November. The cost I (meaning the defendant) have been put to is something considerable: and, how I (meaning the defendant) am to obtain the money to pay my (meaning the defendant's) solicitor, I (meaning the defendant) do not know. Doubting, as I (meaning the defendant) do, my mother's (meaning the plaintiff's and the defendant's said mother) extreme poverty, I (meaning the defendant) think the proper test of it is an order for the workhouse; the expense of which should be borne proportionately between all her children: and, as Miss Fray (meaning the plaintiff) is a lady of independence, and a single woman, and can find the money for carrying on all sorts of law proceedings, she (meaning the plaintiff) should not be exempted." Claim, 200/.

The defendant demurred to this declaration; the ground of demurrer stated in the margin being, "that \*the words set forth in [\*605 the declaration do not amount to a libel." Joinder.

*Inderwick*, in support of the demurrer, submitted that the letter declared upon was clearly not libellous, for that, to constitute a publication libellous, it must be such as is calculated to bring the party libelled into hatred and contempt with his fellow-subjects, or charges him with some offence for which if guilty he would be liable to be indicted, or the like: whereas, here, the gravamen of the charge is, that the plaintiff is a litigious person, without even suggesting that she is actuated by animosity against the writer, or by any improper motives. [ERLE, C. J.—That which may tend to lower the plaintiff in the estimation of others, we cannot withhold from a jury.] The



question is whether this *can* be a libel. There should be at least some scintilla of injury. [ERLE, C. J.—The statute 32 G. 3, c. 60, is in terms applicable only to criminal cases: but it has always been adopted in practice in civil actions.] In *Baylis v. Lawrence*, 11 Ad. & E. 920 (E. C. L. R. vol. 39), 3 P. & D. 526, Lord Denman says: "If the judge and jury think the publication libellous, still, if on the record it appears not to be so, judgment must be arrested."

*Miss Fray* appeared in person to support the declaration.

ERLE, C. J.—We cannot take upon ourselves to hold that the letter in question can under no circumstances be libellous. The matter must go before a jury.

The rest of the court concurring, Judgment for the plaintiff.

\*606] \*EDDISON and Others, the Commissioners of the Nottingham Enclosure, *v.* The REV. JOSHUA WILLIAM BROOKES, Vicar of St. Mary, Nottingham. Nov. 9.

By an act for enclosing lands in the town of Nottingham (8 & 9 Vict. c. vii.), the commissioners were to set out allotments for recreation of the inhabitants, for a cemetery, to the lords of the manor for right of soil,—to the vicar, and Earl Mauvers and certain charitable trustees, and other the persons entitled to corn-tithes, vicarial tithes, &c., and to the said vicar in respect of the glebe-lands and rights of common belonging to such vicar,—and to certain persons entitled to common rights; and by s. 66, after having made the before-mentioned allotments, they were to divide and allot the remainder of the lands to be enclosed unto and amongst the several owners and proprietors thereof and persons who should be entitled to any estate, right, or interest therein, in proportion to the value of their respective rights and interests. Section 69 enacted that the several allotments to be made in pursuance of the act (except the allotments to the mayor, &c., for places of recreation, &c., and the allotments to the said vicar and other persons in lieu of tithes), should be enclosed by the allottees: and by s. 70, it was provided that allotments in lieu of tithes were to be fenced at the general expense.

By s. 86, the commissioners were (before setting out any allotments to the persons entitled to rights of common, to the lord of the manor, persons entitled to tithes, and to the owners and proprietors of lands to be enclosed) to allot what they should judge sufficient to defray the expenses of and incident to the enclosure, and sell the same to defray such expenses. And by s. 89, in case the lands so set apart should be found insufficient to defray such expenses, the deficiency was to be made up and raised from time to time by a rate to be made and levied upon the several persons interested in the lands to be enclosed, *except the said vicar and persons entitled to tithes*, and the mayor, &c., in respect of allotments for recreation, &c. :—

Held, that the vicar was not liable to be rated in respect of the lands allotted to him on account and in lieu of the lands claimed by him as *glebe-lands*, towards the general expenses of the Enclosure Act.

THE following case was stated for the opinion of the court, under the Common Law Procedure Act, 1852 :—

1. The writ herein was issued to recover 487*l.* 7*s.*, the amount of two rates levied by the commissioners upon the vicar in respect of glebe-land, with interest thereon.

2. The public act is 41 G. 3, c. 109, intituled "An Act for consolidating in one act certain provisions usually inserted in Acts of Enclosure;" and the local act is the 8 & 9 Vict. c. vii., intituled "An act for enclosing lands in the parish of St. Mary, in the town and county of the town of Nottingham."

3. By the public act, s. 6, it is enacted that all persons and bodies corporate and politic who shall have or claim any common or other right to or in any lands to be enclosed, shall deliver to the commis-

sioners therein named, and in manner therein mentioned, an account or schedule in writing, signed by them or their agent, of such their respective rights or claims, and \*therein describe the lands and grounds, and the respective messuages, lands, and hereditaments in respect whereof they shall respectively claim to be entitled to any and which of such rights in and upon the same, with the name of the person then in the actual possession thereof, and the particular computed quantities of the same respectively, and of what nature and extent such right is, and also in what right and for what estates and interests they claim the same respectively, distinguishing the freehold from the leasehold, &c.; and, in default of making such claim, shall be barred from any right, as therein mentioned.

4. By the local act, s. 36, all persons claiming any interest in any of the lands to be enclosed shall deliver their respective claims, in writing under their hands, to the commissioners, at the meetings to be held for that purpose, stating the several particulars in respect whereof such claims are made, and distinguishing freehold and leasehold from each other.

5. By the local act, s. 37, after the said claims are received, the commissioners are to examine and determine the same, and make such order as to them shall seem just; and which order shall be final.

6. By the public act, s. 14, the several shares of and in the lands which shall upon division be allotted to the several persons entitled to the same, shall, when so allotted, be in full bar and satisfaction and compensation for their several and respective lands, grounds, rights of common, and all other rights and properties whatsoever which they respectively had or were entitled to on and over the said lands and grounds immediately before the passing of the local act.

7. By the local act, s. 86, for defraying the costs of carrying the local act into execution, the commissioners shall, at such period as they think proper, before any allotments are set out to the parties entitled to \*the rights of common, to the lord of the manor, [608 persons entitled to tithes, and to the owners and proprietors of the lands to be enclosed, mark and allot for sale such portion of the lands as they shall judge sufficient in value to defray the expenses of obtaining and executing the powers of the act, and shall from time to time sell such lands as therein mentioned.

8. By the local act, s. 89, it is provided, that, if at any time it shall appear to the commissioners, either before or after the execution of their award, that the money to arise by such sales shall not be sufficient to defray the expenses aforesaid, the deficiency shall be made up and raised from time to time by a rate to be made and levied upon the several persons interested in the lands to be enclosed (except the said vicar and persons entitled to tithes, and the mayor, aldermen, and burgesses in respect of the lands for places of public recreation, &c.), in such shares and proportions, within such time, and to be paid to such persons, as the commissioners shall from time to time direct.

9. By the local act, s. 90, it is enacted, that, if any person shall refuse to pay his proportion of such expenses within the time and to such person as the commissioners shall appoint, it shall be lawful for the commissioners to recover the same, with interest, by action at law in their own names, in any of Her Majesty's courts of record at

Westminster, or to be levied by distress, or to enter upon the premises allotted, and demise the same, and receive the rents until the rate and expenses shall be paid.

10. By the local act, s. 93, it is enacted that it shall be lawful for the proprietors of allotments being tenants for life, or any other estate of freehold, and also for certain other classes of persons therein mentioned representing persons under incapacity, to charge their allotments with any money not exceeding 5*l.* per acre \*towards \*609] their proportion of the enclosure expenses, by mortgage as therein mentioned.

11. By the local act, s. 94, it is enacted that it should be lawful for the commissioners, on application made to them in writing by any of the proprietors of allotments to be made by virtue of the act, or by any of the husbands, guardians, trustees, committees, or attorneys of or for any of such proprietors, being under coverture, minors, idiots, lunatics, or beyond the seas, or under any other disability or incapacity, or by the persons acting as such guardians, trustees, committees, or attorneys, respectively, or by any of the said proprietors being tenants in tail, or for life or lives, or on any other contingency, or by any trustees or feoffees for charitable, parochial, or other uses, to sell any part of any such allotment, for raising a sum of money sufficient to defray the proportionable part of the expenses which should on such rates be charged upon such parties, and of the expenses of making and completing such sale: Provided always, that it should not be lawful for any proprietor of an allotment to raise by any such sale, or by mortgage and sale, any greater sum of money for the purposes aforesaid than such proprietor might have borrowed or charged upon his allotment for such purposes by virtue of the said first-recited act, 41 G. 3, c. 109, reckoning 5*l.* for each acre thereof: Provided further, that, in all cases in which the money so raised by any such sale should not be equal to the money which might be borrowed or charged on such allotment as aforesaid, it should be lawful for the proprietor, part of whose allotment should be sold as aforesaid, to charge his allotment with any sum not exceeding the difference.

12. By the local act, it is recited in the preamble that Henry Smith, Samuel Fox, and other persons therein named, claimed to be owners \*610] or proprietors of \*or otherwise interested in some of the lands to be enclosed, and other persons also claimed as therein mentioned. And then,—reciting that Earl Manvers was or claimed to be entitled to corn-tithes arising or accruing from the lands to be enclosed, and the Rev. J. W. Brookes, the now defendant, as the vicar of the parish of St. Mary, was or claimed to be entitled to the vicarial tithes arising or issuing out of such lands, or some parts thereof; and that William Watson and others claimed, as devisees under the will of Micah Gedling, to be entitled to the tithes or tenths of hay arising or issuing out of certain parts of the lands to be enclosed; and the charitable trustees of the said town, as trustees of the Free Grammar School of the said town, were or claimed to be entitled to the tithes or tenths of hay arising or issuing out of certain other portions of the said lands,—it is enacted that the public act, 41 G. 3, c. 109, shall be executed as part of the local act, except in such cases wherein the

same is repealed or varied or inapplicable to the purposes of the local act.

13. By the local act, the commissioners are to allot parts of the lands to be enclosed, as follows,—by s. 53, for the purposes of public recreation; by s. 54, for a public cemetery; and by s. 55, for the lord of the manor.

14. By the local act, s. 56, it is provided that the commissioners shall allot and award unto the vicar of the said parish of St. Mary, and unto the said Lord Manvers, William Watson and others, devisees in trust under the will of Micah Gedling, and the charitable trustees of the town of Nottingham, trustees of the Free Grammar School, or other the persons who may be entitled to corn-tithes, vicarial tithes, or tithes or tenths of hay, or other tithes, and to the said vicar in respect of glebe-lands and rights of common belonging to such vicar, such parcels of the lands to be enclosed \*as in the judgment of the commissioners shall be a full equivalent and compensa- [\*611 tion to such persons severally and respectively for their several and respective claims, when substantiated to the satisfaction of the commissioners, in, over, and upon the lands to be enclosed.

15. By s. 57, the commissioners are to allot part of the lands to be enclosed to the freemen of Nottingham, and to the toftstead owners and inhabitant householders: and by s. 66, after the said several allotments have been made, the commissioners shall divide, allot, and award the remainder of the lands to be enclosed unto and amongst the several owners and proprietors thereof, and persons who shall be entitled to any estate, right, or interest therein, and such shares and proportions as the commissioners shall adjudge and determine to be proportionate to the value of their respective rights and interests therein.

16. By the local act, s. 69, it is enacted that the several allotments to be made in pursuance of this act (except the allotments to the mayor, aldermen, and burgesses for places of public recreation, &c., and the allotments to the said vicar and other persons in lieu of tithes) shall be enclosed, ditched, and fenced, at the expense of the respective persons to whom the same shall be allotted, in such manner and within such times as the commissioners shall by their award, or any writing under their hands, direct; and the fences so to be made shall for ever afterwards be repaired and maintained by such persons as the commissioners shall by their award direct.

17. By the local act, s. 70, the allotments to be made to the said vicar and other persons in lieu of tithes shall be well and sufficiently enclosed and fenced on all such parts and sides as shall not be directed to be fenced by any other proprietor, or as shall not adjoin any enclosed land or be bounded by any sufficient \*watercourse or [\*612 other sufficient fence: and the expense attending the enclosing and fencing the same shall be discharged out of the enclosure expenses fund: and all such enclosures and fences, when made, shall for ever thereafter be kept in repair by the said vicar or by the persons for the time being entitled in possession to the said allotments.

18. By s. 88 of the public act, it is provided that the rector or vicar for the time being, by indenture under his hand, with consent of the bishop and patron, may lease or demise all or any part of the allot-

ments allotted to such rector or vicar by virtue of the local act, to any person for any term not exceeding twenty-one years, to commence within twelve months after the execution of the award; so that the rent shall be reserved to the rector or vicar for the time being by four quarterly payments; and so that the best rent be gotten, without taking any premium or consideration for granting the same, and otherwise as therein mentioned.

19. By the local act, s. 73, it is provided that the vicar for the time being of St. Mary, by indenture, with consent of the patron of the vicarage, and with consent of the bishop, may lease or demise all or any part of the allotment to be made to such vicar in right of his vicarage, to any person, for not exceeding twenty-one years, by quarterly payments, so that the best rent be obtained, without taking any fine or consideration for granting such lease; with provisions for cesser, and granting new leases, as therein mentioned.

20. The lands to be enclosed consisted of about 1200 acres. A small portion consisted of two pieces of waste land upon which it was alleged the inhabitant householders and freemen only had a right \*618] of pasturage. All the remainder of the lands consisted of \*lands of freehold tenure belonging to different proprietors owners of the land in fee simple, but subject to a right of pasturage thereon for a limited number of cattle during certain periods of the year: and this right of pasturage existed only in the freemen and the occupiers of a few old houses called toftsteads. The owners of the lands had no right of common over the lands; but owned the land subject to the easement of pasturage as aforesaid: and, on the other hand, the persons entitled to the right of pasturage owned no portion of the lands to be enclosed.

21. The landowners let the lands for beneficial rents; they being entitled to the land during the valuable part of the year, getting the crops; the commoners only getting the aftermath. The landowners were very numerous, and amongst them was the vicar of St. Mary, as the owner of glebe-lands. Such glebe-lands were in every respect under the same conditions as the lands of the other landowners. Glebe-land paid rates, was let for beneficial rents, was subject to the freemen's and toftstead-owners' right of common: and, when the commonable period was over, the fences had to be repaired by the vicar or his tenants: and such glebe-land was utterly indistinguishable from the land of other landowners.

22. Amongst the claims delivered to the commissioners were claims by numerous landowners, specifying the quantity and situation of the land claimed for, and the estate therein of the person making the claim. Earl Manvers made a claim for corn-tithes. William Watson and others, devisees of Micah Gedling, claimed for hay-tithes; and such devisees also made a claim for lands belonging to them as landowners. The charitable trustees claimed for hay-tithes, and such charitable trustees also made a claim for lands belonging to them as \*614] landowners. And all such claims, as well for tithes as for the commissioners.

Amongst the claims was the following, made by the vicar of St. Mary:—

"I claim to be entitled, as vicar of the church of St. Mary, to the several pieces of land described in the annexed terrier, lying in the open and commonable fields of the parish of St. Mary, and to all rights and interests therein, subject nevertheless to certain common rights during part or parts of each year.

"I further claim, as such vicar, to be entitled to all tithes of milk, calves, lambs, wool, agistment, turnips, greens, peas, tares, and green crops of every description, potatoes, pigs, eggs, poultry, and all other tithes, excepting only the tithes of corn, grain, and hay, arising or accruing due as well upon the said open and commonable lands as upon all other the lands of the said parish, excepting only certain portions thereof which have already been exonerated from tithes.

"Terrier of the glebe-lands of the vicarage of the Blessed Virgin Mary, in Nottingham, lying in the open and commonable fields of Nottingham aforesaid:—

*"In the meadows,—*

"One piece of land in the Furlong, abutting on King's meadows, containing by admeasurement 1a. 3r. 37p., lately occupied by John Cooper, bounded north by land of E. and A. Goodhead, south by land the property of the devisees of Gedling, deceased, west by the Earl's closes, east by other lands of the said devisees:

"One other piece of land on the Little Rye Hills, containing by admeasurement 2r. 35p., in the occupation of William Brighton, bounded east, west, north, and south as therein mentioned:

"One other piece of land on the Rye Hills, containing by admeasurement 2r. 5p., occupied by William \*Brighton, and bounded as therein mentioned. [And so on, describing twenty-six pieces of land belonging to him as glebe-land of St. Mary's.]

(Signed) "J. W. BROOKES."

At the hearing before the commissioners, Lord Manvers substantiated his claim for corn-tithes; William Watson and others, devisees of Gedling, deceased, and the charitable trustees of the Free Grammar School, severally substantiated their claims for hay-tithes; and the vicar of St. Mary also substantiated his claim for tithes.

23. Allotments of land were severally made by the commissioners to Lord Manvers, to Gedling's devisees, to the charitable trustees, and to the vicar of St. Mary, in lieu of such tithes, and to the full value thereof, as adjudged by the commissioners.

24. In addition to such allotments for tithes, distinct and separate allotments were also made to the said Gedling's devisees, and to the said charitable trustees, in respect of the lands claimed by them.

25. Distinct allotments amounting to 18a. 3r. 37½p., were also made to the vicar of St. Mary, in respect of and in lieu of the lands claimed by him as glebe-lands; and such allotments were made according to the same conditions and upon identical terms so far as regards value, and in every other respect, as the lands of other landowners.

26. Such allotment of 18a. 3r. 37½p. was in addition to the allotment made to the vicar in lieu of tithes.

27. The effect of the enclosure and of the allotments awarded by the commissioners, was, to convert the lands claimed from mere agricultural lands used chiefly for pasture, subject to common right as above, and capable of no other use, into freehold lands, free from

restrictions and encumbrances, applicable as well for building as any other purpose, and raising their \*value to a very large amount: \*616] and the land allotted to the vicar took these advantages in common with lands allotted to the different landowners.

28. The commissioners have paid out of the enclosure funds the cost of fencing such allotments so made to Earl Manvers, Gedling's devisees, the charitable trustees, and the vicar of St. Mary, in lieu of tithes; but have not paid the cost of fencing the other allotments made to the said persons as landowners, or the allotments made to the vicar in respect of the glebe-land.

29. In carrying the local act into execution, the commissioners marked and allotted for sale certain portions of lands, and sold the same, as directed by the statute, and applied the proceeds in carrying the act into execution: but the moneys arising from such sales not being sufficient to defray the expenses of executing the act, the commissioners have duly made certain rates under s. 89 of the local act upon the several persons interested in the lands to be enclosed; and in such rates the commissioners have rated the vicar in respect of his glebe-lands claimed by him, and have also rated Watson and others, Gedling's devisees, and the charitable trustees, in respect of the lands severally claimed by them: but the commissioners have not rated the Earl Manvers, Gedling's devisees, the charitable trustees, or the vicar of St. Mary, being the several persons entitled to tithes, in respect of the allotments made to them respectively in lieu of tithes.

30. The local act was to be referred to, if required, as part of the case.

31. The vicar of St. Mary contended that he was not liable to be rated in respect of the lands allotted to him in lieu of the glebe-lands claimed by him. The commissioners contended that he was liable to be rated in respect of his glebe-lands.

\*32. The question for the opinion of the court was,— \*617] whether the vicar was liable to be rated in respect of the lands allotted to him on account and in lieu of the lands claimed by him as glebe-lands.

If the court should be of opinion that the vicar was liable to be so rated, then judgment was to be entered for the plaintiffs for 487*l.* 7*s.*, and costs of suit. If the court should be of a contrary opinion, judgment was to be entered for the defendant, with costs of suit.

*Boden*, Q. C. (with whom was *Quain*), for the plaintiffs.(a)—The vicar, it is submitted, is liable to be rated in respect of the lands allotted to him on account and in lieu of the lands claimed by him as glebe-lands. By the local enclosure act, the preamble of which recites the locality and the nature of the lands to be enclosed and the persons entitled as owners of land and of other rights (including the vicar), the commissioners are to set out allotments for recreation for the inhabitants of Nottingham (s. 53); for a cemetery (s. 54); to the lords of the manor for right of soil (s. 55); to the vicar of the parish of St. Mary, and to Earl Manvers, W. Watson, J. Fox, and T. Chou-

(a) The point marked for argument on the part of the plaintiffs was as follows:—

"That the exemption from rates contained in the 89th section of the local act, 8 & 9 Vict. c. vii., applies only to lands allotted to the defendant in lieu of tithes, and not to lands allotted to him in lieu of any other claim."

ler, devisees in trust under the will of Micah Gedling, deceased, and the charitable trustees of Nottingham, trustees of the free grammar school, or *other* the persons who may be entitled to corn-tithes, vicarial tithes, or tithes or tenths of hay, or other tithes, and to the said vicar in respect of the glebe-lands and rights of common belonging to such vicar (s. 56); to the \*freemen of Nottingham and owners [618 of ancient toftsteads in the said town, and inhabitant householders of the town, and others (if any) entitled to rights of common (ss. 57-59),—the 66th section enacts, “that, after the several allotments hereinbefore directed shall have been made, the commissioners shall divide, allot, and award all the remainder of the lands to be enclosed unto and amongst the several owners and proprietors thereof, and persons who shall be entitled to any estate, right, or interest therein, in such shares and proportions as the commissioners shall adjudge and determine to be proportionate to the value of their respective rights and interests therein.” The 69th section enacts that “the several allotments to be made in pursuance of this act (except the allotments to the mayor, &c., for places of recreation, public walks, and baths, and the allotments to the said vicar and other persons in lieu of tithes) shall be enclosed, ditched, and fenced at the expense of the respective persons to whom the same shall be allotted, in such manner and within such times as the commissioners shall by their award or any writing under their hands direct, and the fences so to be made shall for ever afterwards be repaired and maintained by such persons as the commissioners shall by their award direct.” By s. 70, allotments in lieu of tithes are to be fenced at the general expense. By s. 73, the vicar has power to lease the allotment made to him in right of his vicarage. By s. 86, the commissioners are empowered, for the purpose of raising money for defraying the expenses of the enclosure, “at such period as they think proper (before any allotments are set out to the persons entitled to rights of common, to the lord of the manor, persons entitled to tithes, and to the owners and proprietors of the lands to be enclosed), to mark and allot such parts of the lands to be enclosed as they shall judge sufficient in value to \*defray the expenses incurred preparatory to and in obtaining [619 and in executing the powers of the act, and shall from time to time as they shall find expedient sell and dispose of the same, either by public auction or private contract; and the purchase-moneys to arise by such sales shall be paid into the hands of the commissioners, and shall be by them applied in discharging the said expenses.” Then comes the 89th section, which enacts, “that, if at any time it shall appear to the commissioners, either before or after the execution of their award, that the money to arise by such sales shall not be sufficient to defray the expenses aforesaid, the deficiency shall be made up and raised from time to time by a rate to be made and levied upon the several persons interested in the lands to be enclosed (*except the said vicar and persons entitled to tithes*, and the mayor, aldermen, and burgesses in respect of the lands allotted for places of recreation, public walks, and baths), in such shares, and proportions, within such time, and to be paid to such persons as the commissioners shall from time to time direct.” The question turns upon this exception. That is to be construed with reference to the general powers of the



act. The exception refers to the vicar as one of the tithe-owners, and not in his capacity of landowner in respect of his glebe. It has reference to the class of persons whose allotments are under ss. 69, 70, to be fenced and enclosed at the general expense. [BYLES, J.—The expression in ss. 69, 70, is “the said vicar and other persons in lieu of tithes:” but, in the exception in s. 89, the word “other” is omitted.] The form of expression, no doubt, is somewhat inaccurate; but the intention is obvious enough, when the whole of the provisions are looked at together. The 69th section beyond question refers to the vicar only in his capacity of tithe-owner. There could be \*620] no reason why the vicar, as landowner, should be favoured at the expense of the other proprietors of land.

*Mellish, Q. C.* (with whom was *A. Wills*), contra (a)—The 89th section of the local act in terms excepts “the said vicar and persons entitled to tithes, and the mayor, aldermen, and burgesses in respect of the lands allotted for places of recreation, public walks, and baths,” from liability to be rated to make up the deficiency in the fund raised under s. 86 for defraying the expenses of and incident to the enclosure. And there is good reason why these large expenses should not be charged upon one who has only a life-interest in his allotment, without the power of charging it, as others having limited interests may, by mortgage or sale of part under ss. 93 and 94.(b) It is under s. \*621] 57 that the allotments to the vicar in respect of tithes and glebe-lands and rights of common are to be made, and not under s. 66, which relates only to the allotment of the residue of the lands to be enclosed among the other owners and proprietors. The persons named in s. 56, the vicar, and the tithe-owners, are to receive “such parcels of the lands to be enclosed as in the judgment of the commissioners shall be a full equivalent and compensation to such persons severally and respectively for their several and respective claims in, over, or upon the lands to be enclosed.” Would the vicar receive a full equivalent and compensation for his claims, if his allotment in respect thereof was to be charged with the large sum now sought to be imposed upon it?

*Boden, Q. C.*, in reply.—The 93d and 94th sections very much strengthen the argument on the part of the plaintiffs. The vicar is

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That the power of the commissioners to make the rate in dispute is given by s. 89 of the local act, 8 & 4 Vict. c. vii.:

“2. That, by that section, the vicar is excepted from the persons on whom the rate is to be made:

“3. That there is no limitation, express or implied, of that exception; and that it applies to all allotments made to him as vicar.”

(b) The 93d section enacts that it shall be lawful for the respective proprietors of allotments to be made by virtue of the act, being tenants for life or in tail, or for any other estate of freehold or inheritance, and also for the husbands, guardians, trustees, committees, or attorneys of any of the proprietors being under coverture, infants, lunatics, idiots, or beyond seas, or otherwise incapacitated, and for the trustees or feoffees for charitable, parochial, or other uses, or a competent number of them, in respect of any lands held by them in trust for any charitable, parochial, or other uses (with the consent of the commissioners, testified in writing under their hands and seals), from time to time to charge their allotments with any money not exceeding 5l. per acre towards their respective proportions of the enclosure expenses, and, for securing the repayment of such money, with interest, to mortgage the said allotments, &c. And s. 94 empowers such persons to sell a portion of any such allotment for the like purpose, under certain limitations.

clearly a tenant for life within the meaning of those provisions. The 30th section of the General Enclosure Act, 41 G. 3, c. 109, contains an express exception in favour of rectors and vicars. The vicar here, in respect of his allotment for the glebe-land, is treated like any other landowner. He takes a valuable benefit under the enclosure: there is therefore no reason why he should be relieved from the concomitant burthen. [BYLES, J.—The 89th section gives the commissioners power to enforce payment of the additional rate by action at law or by entry upon the whole of the land to be allotted. If the commissioners had under s. 84, set apart a sufficient quantity \*of the [\*622 land to defray the expenses, there would have been no need of a rate. They were bound to take care to reserve enough for that purpose.] The 89th section was inserted for the express purpose of remedying any failure in that respect. [BYLES, J.—If the vicar and the other persons exempted from contribution to the enclosure expenses by s. 69, are held liable to be assessed to the additional rate under s. 89, they will not get the full equivalent and compensation contemplated by s. 56.] The whole scope of the act shows that the vicar was to be dealt with in respect of his glebe-land in the character of an ordinary landowner.

ERLE, C. J.—I am of opinion that the vicar of St. Mary's is not liable to be rated in respect of the lands allotted to him on account and in lieu of the lands claimed by him as glebe-lands, towards the general expenses of the Enclosure Act. The act gives the commissioners power, under s. 86, before any allotments are set out to the persons entitled to rights of common, to the lord of the manor, persons entitled to tithes, and to the owners and proprietors of the lands to be enclosed, to mark and allot such parts of the lands to be enclosed as they shall judge sufficient in value to defray the expenses incurred preparatory to and in obtaining and in executing the powers of the act, and to sell the same, and apply the proceeds in discharging the said expenses. And, if the money to arise by such sales shall not be sufficient to defray such expenses, they are, by s. 89, to make up the deficiency by a rate to be made and levied upon the several persons interested in the lands to be enclosed,—except the said vicar and persons entitled to tithes, and the mayor, &c., in respect of the lands allotted for places of recreation, &c. Mr. Boden has contended \*that this exception only extends to the vicar in so far as he [\*623 is interested in tithes: Mr. Mellish, on the other hand, contends that it applies to the vicar's rights in respect of the glebe-land also. I am of opinion that the latter construction is the true one, and that the vicar is exempted absolutely. The act names several classes of allottees, and amongst them the vicar, who by s. 56 is to have, in respect of the vicarial tithes, and of the glebe-lands and rights of common belonging to him, a full equivalent and compensation for his claims in, over, and upon the lands to be enclosed. Then, when all these have been provided for, the residue is (by s. 66) to be allotted amongst the landowners. By s. 69, the several allotments (except those for places of recreation, &c., and to the vicar and other persons in lieu of tithes) are to be fenced at the expense of the allottees. Then comes s. 86 which provides for the appropriation of a certain portion of the lands to be sold for the purpose of defraying

the general expenses of the enclosure. The vicar has no interest in the quantity to be set apart for defraying the expenses of the enclosure. He is to have an allotment which is to be a full equivalent and compensation for his tithes and glebe. The fund, therefore, out of which the expenses of the enclosure are to come, is to be irrespective of the allotments to the vicar. And by s. 89, in case the fund provided under s. 86 falls short of the amount required for that purpose, the deficiency is to be made up by a rate. It seems to me to stand to reason that the intention of the legislature was, that those who had not paid enough to defray the expenses of the enclosure which were cast upon them by the act were to be assessed for the purpose of making up the deficiency. If that be so, the liability to be assessed is not cast upon those who are to have allotments equivalent \*in value to the interests they had. The 89th section \*624] may well be read in furtherance of that view. The vicar and the persons entitled to tithes are exempted absolutely, and the mayor, &c., in respect of the allotments for recreation, &c. The 69th and 70th sections make it clear that the allotments in respect of tithes are to be fenced at the general expense, and the allotment to the vicar in respect of the glebe at the vicar's expense. Upon the words, therefore, and upon the general scope of the act, it seems to me that the vicar is exempted from assessment to this rate.

BYLES, J.—I am of the same opinion. I must confess, that, at the commencement of the argument, I was inclined to think otherwise: but, upon full consideration, I now think that the literal construction of the act of parliament is the true one. As to the literal construction there can be no doubt. The vicar was to have a full equivalent and compensation both in respect of his tithes and his glebe. I cannot add anything to what has been pointed out by my Lord. If the vicar is to be subject to this charge, he might be called upon to pay during his time more than the amount of all the benefit he could derive from his allotment.

KEATING, J.—I am entirely of the same opinion. Looking at the general scope and object of the statute, and at the way in which the 56th section deals with the vicar, it is clear that he was intended by s. 89 to be exempted from the rate with reference to the description in s. 56. In that section he is dealt with in two capacities,—as owner of the vicarial tithes, and as entitled to an allotment in respect of the \*glebe-lands. Mr. Boden says he has in respect of the \*glebe-lands been dealt with like the other landowners. But, taking the 56th and 89th sections together, I think it is clear that the vicar was intended to be altogether exempted.

Judgment for the defendant.

THE VESTRY OF CHELSEA, Appellants; JAMES KING,  
Respondent. Nov. 14.

The powers conferred upon the commissioners under the 68th section of Michael Angelo Taylor's Act, 57 G. 3, c. xxix., absolutely to prevent the keeping of swine in any house, building, yard, garden, &c., in or within forty yards of any street, or public place within the district comprised in that act, is not extended by the 73d section of the Metropolis Local Management Acts Amendment Act, 25 & 26 Vict. c. 102, to the larger district comprised within such last-mentioned act.

THE following case was stated for the opinion of this court:—

James King, the respondent, was summoned to appear before H. S. Selfe, Esq., one of the magistrates of the police courts of the Metropolis, sitting at the Westminster police court, upon a complaint made by Charles Lahee, on behalf of the vestry of St. Luke's, Chelsea, the appellants, for unlawfully keeping swine in a yard within forty yards of a street called Symons Street, in the parish of Chelsea, within the Metropolis, contrary to the statutes 57 G. 3, c. xxix. (Michael Angelo Taylor's Act), and 25 & 26 Vict. c. 102 (the Metropolis Local Management Acts Amendment Act), s. 73.

It was proved that the respondent kept certain swine in a yard called Brook's Yard, within forty yards of Symons Street.

*It was not proved that they were so kept as to be in any way a nuisance, or injurious to health.*

\*The statute 57 G. 3, c. xxix., does not apply to the parish of Chelsea, or to the place where the swine are kept, unless it applies to it by virtue of the statute 25 & 26 Vict. c. 102, s. 73. [\*626]

The appellants contended that the whole of the 68th section of the statute 57 G. 3, c. xxix., was extended to the metropolis by the statute 25 & 26 Vict. c. 102, s. 73, that its provisions were imperative, and therefore that the magistrate was bound in point of law to convict the respondent.

The magistrate doubted whether,—the swine in question not being a nuisance, nor straying in the streets,—the case came within the 73d section of the 25 & 26 Vict. c. 102, which extends to the Metropolis only so much of the 57 G. 3, c. xxix., as relates to the powers of improving and regulating the streets, and for the suppression of nuisances: see especially s. 67 of the last-mentioned act.

Having regard to the provisions of the Police Act, 2 & 3 Vict. c. 47, s. 60, clause 5, and to the Nuisances Removal Act, 18 & 19 Vict. c. 121, s. 8, the magistrate dismissed the complaint, on the ground that he was not bound in point of law to convict the respondent.

The appellants being dissatisfied with that decision, and conceiving it to be erroneous in point of law, the opinion of the court was requested whether the magistrate was bound in point of law to convict the respondent.

Keane, Q. C., for the appellants.(a)—The question \*turns [\*627] mainly upon the construction to be put upon the 67th and 68th

(a) The points marked for argument on the part of the appellants were as follows:—

"1. That the provisions of the 68th section of the 57 G. 3, c. xxix., are all of them powers of improving and regulating streets, and for the suppression of nuisances:

"2. That the 68th section was in force at the time of the passing of the 25 & 26 Vict. c. 102:

sections of Michael Angelo Taylor's Act, 57 G. 3, c. xxix. The 67th section enacts, that, "in case any hog-stye, slaughter-house, horse-boiling establishment, or any other matter which in the judgment of the commissioners or trustees or other persons having the control of the pavements in any parochial or other district within the jurisdiction of this act (a) is a nuisance to the inhabitants of such parochial or other district, or any of them, at any time or times hereafter shall be in any of the streets, lanes, or public places in any parochial or other district within the jurisdiction of this act, it shall be lawful for the said commissioners, &c., upon complaint thereof to them made by any \*628] inhabitant, and, after due investigation of such \*complaint, by notice in writing under the hand or hands of any of their surveyor or surveyors, or of their clerk or clerks for the time being, to order that every or any such hog-stye, necessary-house, slaughter-house, or other matter, *being a nuisance*, shall be forthwith remedied or removed:" and it proceeds to impose a penalty for disobedience of the order. By s. 68, it is further enacted that "no person or persons whomsoever, at any time or times hereafter, shall breed, feed, or keep any kind or species of swine in any house, building, yard, garden, or other hereditaments, situate and being in or within forty yards of any street or public place in any parochial or other district within the jurisdiction of this act, nor shall suffer any kind or species of swine belonging to him or them to stay or go about in any street or public place in any parochial or other district within the jurisdiction of this act:" and it imposes a penalty of 40s. and forfeiture of the offending swine. The object of these provisions is the *prevention* not the suppression only of nuisances,—the keeping swine is the offence to be put down. To suppress is to overpower or subdue an existing evil (see Webster's Dictionary). To prevent is to hinder its perpetration. This is the evident meaning of the word in s. 73, which applies to the carrying of soap-lees, night-soil, &c., through the streets. The 5th clause of s. 60 of the Metropolitan Police Act, 2 & 3 Vict. c. 47, which imposes a penalty on "every person who shall keep any pig-stye to the front of any street or road in any town within the said district, not being shut out from such street or road by a sufficient wall or fence, or who shall keep any swine in or near any street, or in any dwelling, so as to be a common nuisance," as well as the Nuisances

"3. That the 68th section is not inconsistent with the Metropolis Local Management Act, 18 & 19 Vict. c. 120, or with any of the Metropolis Management Amendment Acts:

"4. That the 68th section applies to the metropolis as defined by the Metropolis Management Acts, and therefore to the parish of Chelsea, by force of the 73d section of the Metropolis Local Management Act, 1852:

"5. That the provisions of the 68th section relating to the keeping of swine, are powers for improving and regulating or for regulating streets:

"6. That the said provisions are powers for the suppression of nuisances in the streets of the metropolis, that is, in the words of the title of the 57 G. 3, c. xxix., for *removing and preventing* them:

"7. That the other provisions mentioned in the case do not apply to prevent the nuisance or effect the object contemplated by the 68th section of the 57 G. 3, c. xxix."

(a) This extends (by s. 1) to "all streets and public places which are now paved, or which may be hereafter paved, within the cities of London and Westminster and borough of Southwark, and any other parts of the metropolis which are included within the weekly bills of mortality, and to all streets and public places which are now paved, or which may be hereafter paved, within the parishes of St. Pancras and St. Mary-le-bone, in the county of Middlesex."

Removal Act, 18 & 19 Vict. c. 121, s. 8,—which were referred to by the magistrate,—both relate to actual nuisances. For these [\*629] \*reasons, it is submitted, the magistrate ought to have convicted the defendant. [BYLES, J.—Is there any provision other than those in the 57 G. 3, c. xxix., to prevent the keeping of pigs within forty yards of a street or highway?] None. One main object of the legislature was, to prevent the risk of those evils which may result from the keeping of swine in a densely populated neighbourhood: and the law which applies to one district must apply to all those to which the prohibition is extended. [ERLE, C. J.—Where an act of parliament is susceptible of two constructions, one of which will have the effect of destroying the property of large numbers of the community, and the other will not, we must assume that the legislature intended the former to be applied to it. Michael Angelo Taylor's Act took in all the densely populated districts or places within or near the metropolis; and it gave extensive powers for removing and preventing nuisances and obstructions therein. The 73d section of the 25 & 26 Vict. c. 102, extends to the larger area to which its enactments apply, not all the powers of the former act for removing and preventing, but only those for the suppression of nuisances. The act seems to me to be drawn in a workmanlike manner.]

No one appeared on behalf of the respondent.

ERLE, C. J.—In Michael Angelo Taylor's Act, 57 G. 3, c. xxix., s. 68, is contained a provision that "no person or persons whomsoever, at any time or times hereafter, should breed, feed, or keep any kind or species of swine in any house, building, yard, garden, or other hereditaments situate and being in or within forty yards of any street or public place in any parochial or other district within the jurisdiction of that act, nor should suffer any kind or species of swine [\*630] \*belonging to him or them to stray or go about in any street or public place in any parochial or other district within the jurisdiction of that act:" and a penalty of 40s. is imposed for every such offence, besides forfeiture of the swine. That act extended to all streets and public places within the weekly bills of mortality, embracing therefore many densely populated districts. The act contains a great number of provisions prior to the 68th section, for regulating the streets of the metropolis, and for removing and preventing nuisances and obstructions and things approximating to nuisances in various ways: and then the 68th section absolutely prohibits the keeping of swine, in whatsoever manner they may be kept, nuisance or no nuisance, in or within forty yards of any street or public place. So stood the law upon this subject under Michael Angelo Taylor's Act. Afterwards came the 25 & 26 Vict. c. 102, which extends over a much larger area, taking in some rural districts, as well as several districts which are densely populated, from Fulham to Woolwich. The board, which was originally created by the 18 & 19 Vict. c. 120, has very extensive powers for the removal of actually existing nuisances. The question is whether they have the power to prevent the keeping of pigs in the manner described in this case. The power given to the commissioners under the 68th section of Michael Angelo Taylor's Act, which is a clause of a highly penal nature, is extended to the local board by the 73d section of the Metropolis Local Management

Acts Amendment Act, 25 & 26 Vict. c. 102. That section enacts that "the powers of improving and regulating streets, and for the suppression of nuisances, contained in the 57 G. 3, c. xxix., intituled 'An act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein,' shall, so far as the same is in force, and is not inconsistent with the

\*631] "provisions of the recited acts(a) and this act, extend and apply to the metropolis as defined in the firstly-recited act and in this act, including any unpaved streets, and notwithstanding any exceptions therein contained." Is the power contained in the 57 G. 3, c. xxix., of inflicting a penalty for keeping pigs in a manner which creates no nuisance, extended by the recent enactment, so as to compel the magistrate under the circumstances mentioned in this case to convict the party? I think not. The powers vested in the commissioners under the old act might have been conferred upon the new board in toto: nothing could have been easier for the draughtsman who drew the act than to say so if such had been the intention. He has, however, taken only part of the powers contained in the 57 G. 3, c. xxix. The act is "for better paving, improving, and regulating the streets of the Metropolis, and removing and preventing nuisances and obstructions therein:" the powers which are transferred to the new board are "the powers of improving and regulating streets, and for the suppression of nuisances." A great portion of Michael Angelo Taylor's Act relates to the paving of the streets of the metropolis. The legislature clearly did not intend by the 78d section of the 25 & 26 Vict. c. 102, to transfer those powers, but only the power to suppress nuisances. Michael Angelo Taylor's Act contains many powers for removing and preventing nuisances, some actual, some inchoate. The keeping of pigs is prohibited, though no nuisance. I think the 78d section of the 25 & 26 Vict. c. 102 transfers all the powers for the suppression

\*632] of nuisances, not those for \*preventing them. Where the keeping of pigs becomes a nuisance, the neighbours may go to the board, and ask them to put in force their powers to suppress it. But pigs may well be kept in very many places within the extensive district defined in the Metropolis Local Management Acts, a very few yards from a public street, without annoying the most fastidious person. By the interpretation clause, s. 250 of the 18 & 19 Vict. c. 120, "street" would embrace the most secluded foot-path in a country district. It enacts that the word "street" shall apply to and include "any highway (except the carriage-way of any turnpike-road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage." The change of terms I think authorizes me to come to the conclusion that the magistrate was right in holding that he was not under the circumstances bound to convict the defendant. If the prohibition to keep pigs extends to Chelsea, it must equally extend to every place within the large district embraced by the Metropolis Local Management Acts. The magistrate may exercise his jurisdic-

(a) The Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120, the Metropolis Local Management Act Amendment Act, 1856, 19 & 20 Vict. c. 112, and the Metropolis Local Management Act Amendment Act, 1858, 21 & 22 Vict. c. 104.

tion the moment the pig-stye becomes an annoyance to the neighbourhood. It is said that, all nuisances being brought under the jurisdiction of the local board, if the powers of the act are not extended to such things as are likely to become nuisances, the act will virtually have no operation. But every one of those powers may very well exist under Michael Angelo Taylor's Act within the weekly bills of mortality, without extending the prohibition against keeping pigs in the out districts. For these reasons, I am of opinion that the decision of the magistrate should be affirmed.

\***BYLES, J.**—I am of the same opinion. Agreeing as I do in all that has fallen from my Lord, I will only add that I conceive the rule to be, that, in the construction of every written instrument, the surrounding circumstances are to be considered, and that that rule applies as well to acts of parliament as to deeds or wills. And, when it appears that this act is extended to a very large district, and that the provisions are very stringent, and may be put in force from motives of malice or extreme nicety and fastidiousness, it seems to me that we ought to see that the offence has really been committed, and at all events not to strain the words of the act beyond their fair natural sense. Michael Angelo Taylor's Act contains two sets of provisions,—the one, for the removal or suppression,—the other, for the prevention of nuisances. The 25 & 26 Vict. c. 102, s. 73, transfers to the local board, not in terms the power of *preventing* nuisances, but in terms the power of *suppressing* them. It means existing nuisances. The magistrate who has stated this case has evidently well considered the subject. For the reasons given by my Lord,—which I will not darken by repeating them,—I think the rational construction of the 73d section of the 25 & 26 Vict. c. 102, is the true and literal construction. [\*633]

**KEATING, J.**—By the 68th section of Michael Angelo Taylor's Act, 57 G. 3, c. xxix., the keeping of swine in or within forty yards of any street or public place within the ambit affixed to that act is declared to be a nuisance, and prohibited. Various other nuisances and offences are to be dealt with under that act. The Metropolis Local Management Act of 1862 has transferred to the authorities created under the new system of local government all the powers contained in Michael Angelo Taylor's Act for the suppression of \*nuisances. That does not include the powers for preventing [\*634] nuisances in the mode suggested by that act. Prior to the passing of the 25 & 26 Vict. c. 102, the local board had very large powers for the removal of existing nuisances; but they had not the power of preventing the possibility or probability of a nuisance arising, by punishing or preventing the keeping of swine within forty yards of any street, when not a nuisance. That being the state of things, the 73d section of the 25 & 26 Vict. c. 102 provides that "the powers of improving and regulating streets, and for the suppression of nuisances, contained in the 57 G. 3, c. xxix., intituled 'An act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein,' shall, so far as the same is in force,"—some of the provisions having been affected by subsequent acts,—and is not inconsistent with the 18 & 19 Vict. c. 120, 19 & 20 Vict. c. 112, and 21 & 22 Vict. c. 104, and this act, extend



and apply to the metropolis as defined in the firstly-recited act, and in this act, including any unpaved streets," &c. I have during the argument entertained very great doubt whether the legislature did not intend to transfer the powers contained in the section referred to (57 G. 3, c. xxix., s. 68) to the keeping of swine within the extended district, even though not an actual nuisance. I cannot say that that doubt has been altogether removed. But I so far agree with my Lord and my Brother Byles that I am not prepared to dissent from the conclusion they have come to. Decision affirmed.

\*635] \*MILLS v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF COLCHESTER.

Nov. 14.

The corporation of Colchester having in 1740 become suspended by reason of certain proceedings on quo warranto in the Court of King's Bench, an act of 31 G. 2, c. 71, was passed for amongst other things, preserving the Colne Fishery which had been by ancient charters vested in them. By that act,—after reciting the charters and letters-patent of incorporation, "that the said mayor and commonalty, and their predecessors, had for time immemorial, as well by virtue of their prescriptive rights, as of the said letters-patent, granted licenses to oyster-dredgers to dredge and take oysters in the said fishery," and had held courts and made rules and orders for governing and preserving the fishery,—and that, by reason of the judgments of the Court of King's Bench, there remained no mayor, aldermen, or justices of peace, nor any person or persons to hold courts or make or enforce rules for the government and preservation of the fishery,—it was enacted, that, from and after the passing of that act, it should be lawful to and for the justices residing within the borough or within the Colchester division of the county of Essex, and *they were thereby required*, to hold courts, appoint officers, "and grant licenses to such oyster-dredgers as should apply for the same, under the usual and accustomed payments and fees, and in such manner as the said mayor and commonalty, or their predecessors, had theretofore used to grant such licenses," &c. By s. 2, a penalty of 5*l.* was imposed upon non-licensed persons dredging in the fishery. By s. 4, the payments and fees for licenses, and all fines, were to be paid to the justices, and, after the reincorporation of the borough, to the chief magistrate thereof, &c., and be applied in the first place in payment of the necessary charges of obtaining the act, and then to the assignees of a mortgage on the estates of the late mayor and commonalty. And by s. 5, it was provided, enacted, and declared, that "the powers and authorities thereby given to the justices should continue and be in force only and until his Majesty, his heirs or successors, should please to reincorporate the said borough; and that, from such incorporation, all the powers and authorities thereby vested in the said justices should cease to be in such justices, and should from thenceforth be and remain in such body corporate, for the uses aforesaid; and that all the other powers, matters, and things thereby enacted, should stand ratified and confirmed to such corporation."

In 1763, by charter of 3 G. 3, (a) the borough was reincorporated.

In an action against the new corporation for refusing to grant a dredging license to the plaintiff, the declaration averred that the plaintiff, before and at the time of his applying for such license, was, and thence hitherto had been and was, an oyster-dredgerman qualified and

(a) By this charter it was recited that it had been represented to the Crown, that, by certain judgments of ouster "the said corporation is now dissolved, or at least incapable of enjoying and exercising their said liberties and franchises." It then proceeded to reincorporate the borough, and by it the King did "ratify, confirm, and restore, as far as in us lies, to the aforesaid mayor and commonalty of the borough aforesaid,—the new name of incorporation, which appeared also to be the old one,—and their successors, all and singular so many, such like and the same hamlets, &c. fisheries, fishings, waters, conservancy of waters, rivers, creeks, and banks, &c. authorities, liberties, privileges, rights, jurisdictions, &c. which the men, free burgesses of the said borough, now or heretofore had, used, and enjoyed, or as they or any of them, or their predecessors, burgesses of the said borough, by whatsoever name or names, or by whatsoever title of incorporation, they were known or incorporated, to them or their successors, by reason or virtue of any charters or letters-patent by any of our progenitors or ancestors, late Kings or Queens of England, heretofore made, granted or confirmed, or by whatsoever other lawful manner, right, title, custom, prescription, or use heretofore lawfully used, had, or accustomed:" "To have, hold, and enjoy, &c. under the ancient fee farm theretofore accustomed to be rendered to us for the same."

By charter of 58 G. 3 (1818), it was recited, that, since the last charter, by judgments on Informations, &c., the said corporation is now incapable of enjoying and exercising their said liberties and franchises: "and a new grant of the former rights was made.

entitled to apply for, demand, and have a license from the defendants *under the said act of parliament*, to dredge and take oysters in the said fishery under the usual and accustomed payments and fees; that he claimed at the proper court to be licensed; and that, although all conditions precedent to entitle him to such license had been performed, &c., the defendants refused to license him:—

Held, on demurrer, that, whatever the immemorial custom might be, there was nothing in the act of parliament which imposed upon the corporation the duty or obligation of granting licenses for any accustomed payment or fee; and that consequently the declaration was bad.

THIS was an action against the mayor, aldermen, and burgesses of Colchester, for refusing to grant the plaintiff a dredger's license pursuant to the Colne Fishery Act, 31 G. 2, c. 71.

\*The first count of the declaration stated, that an act of parliament was passed in the 31st year of the reign of King [\*636 George the 2d, intituled "An act for regulating, governing, preserving, and improving the oyster-fishery in the river Colne and waters thereto belonging; that the several recitals in the said act contained were and are true in fact; and that, after the said act was passed, the late King George the 3d, by his letters-patent, bearing date the 9th of September, in the third year of his reign, reincorporated the mayor and commonalty of the said borough of Colchester, by the name of "The Mayor and Commonalty of the Borough of Colchester," and granted to them perpetual succession, and a common seal, and did thereby ratify, confirm, and restore, as far as in him lay, to the said mayor and commonalty of the said borough and their successors the said fishery, with the authorities, liberties, privileges, rights, and jurisdictions which the free burgesses of the said borough then and theretofore, had, used, and enjoyed, or which their predecessors, burgesses of the said borough, by whatsoever name or title of incorporation they were known or incorporated, had theretofore lawfully had and used: and the said mayor and commonalty of the said borough of Colchester duly accepted the said letters-patent; whereupon the said oyster-fishery in the said river Colne, in the said act of parliament mentioned, became and was vested in the said reincorporated mayor and commonalty of the said borough of Colchester, together with the said powers and authorities which by the said act were given to the justices of the peace residing within the said borough and the liberties thereof, and within the Colchester division of the said county, until the said reincorporation; and the said fishery, with the said powers and authorities, and all other powers by the said act given, remained and continued vested in the \*mayor and [\*637 commonalty of the said borough of Colchester until and at the time of the passing of the act made in a session of parliament holden in the 5 & 6 W. 4, intituled "An act to provide for the regulation of municipal corporations in England and Wales," and until the said corporation, pursuant to the last-mentioned act, and after the first election of councillors under the same, took and had the name of "The Mayor, Aldermen, and Burgesses of the said Borough of Colchester," being the now defendants, in whom the said oyster-fishery, with the powers and authorities aforesaid given by the said act of the 31st year of King George the 2d have been vested ever since the last-mentioned change of the name of the said corporation, and still are vested, for the uses in the said act mentioned: Averment, that, from the time of the said reincorporation until the present time,

the said corporation, by its name for the time being aforesaid, had been used and accustomed, in pursuance of the said act, once or oftener in every year, to keep and hold the said court commonly called the Admiralty Court, in the said first-mentioned act of parliament mentioned, at such place as therein mentioned, and to appoint a water-serjeant or bailiff, and to grant licenses to such oyster-dredgermen as have applied for the same, under the usual and accustomed payments and fees, and in such manner as the said mayor and commonalty of the said borough of Colchester in the said act mentioned, or their predecessors, had before the said act of parliament been used to grant such licenses, to be paid in such manner as in the last-mentioned statute mentioned: that the plaintiff, before and at the time of his applying for such license as thereafter mentioned, was, and thence hitherto had been and was, an oyster-dredgerman, qualified and entitled to apply for, demand, and have a license from the \*638] defendants under \*the said act of parliament, to dredge and take oysters in the said fishery, under the usual and accustomed payments and fees, and in such manner as aforesaid, to be paid as aforesaid, and the plaintiff then was and is personally interested therein: that the defendants, theretofore, to wit, on the 29th of February, 1864, pursuant to the said first-mentioned act, held the said court commonly called the Admiralty Court, at a convenient place within the jurisdiction in the said act mentioned, for the purposes in the said act mentioned, and, amongst others, for the purpose of granting such licenses as therein mentioned to such oyster-dredgermen as therein mentioned, and at such court did grant divers licenses to dredge and take oysters in the said fishery to divers oyster-dredgermen who then and there applied for the same, under the usual and accustomed payments and fees, and in such manner as in the said act mentioned, to be paid as therein mentioned: and that, although the plaintiff, at the said court, duly applied to the defendants for and demanded of them a license to the plaintiff to dredge and take oysters in the said fishery, under the usual and accustomed payments and fees, and in such manner as in the said act mentioned, to be paid as therein mentioned, and was then and there ready and willing, and tendered and offered the defendants, to pay them such usual and accustomed payments and fees, in manner as in the said act mentioned, and the plaintiff performed all conditions precedent, and all things happened, and all times elapsed which were necessary to entitle the plaintiff to have such license granted to him by the defendants: yet the defendants did not nor would grant any such license as aforesaid to the plaintiff, but made default therein, and had hitherto wholly refused so to do; whereby the plaintiff had been and was deprived \*639] of his right to fish in the said \*fishery, and of the gains and profits which he might and would have made thereby, and had become and was subject to the penalties in the said act mentioned if he fished in the said fishery, for the want of such license as aforesaid: Claim, 500*l*.

And, for a second count, the plaintiff repeated all and every the recitals, statements, and matters in the said first count contained, and further said that the defendants still wrongfully withheld such license as aforesaid from the plaintiff, whereby the plaintiff still sustained

and would sustain such damage as aforesaid; wherefore the plaintiff claimed a writ of mandamus to command the defendants to keep and hold such Admiralty Court as aforesaid at some convenient place within their jurisdiction, pursuant to the said statute passed in the 31st year of the reign of King George the Second, and to grant a license to the plaintiff, being such oyster-dredgerman as aforesaid, to dredge and take oysters in the said fishery, under the usual and accustomed payments and fees, and in such manner as in the said statute mentioned, to be paid as therein mentioned, pursuant to the said statute.

The defendants pleaded,—first, not guilty,—secondly, that they had not at any time been used or accustomed to grant licenses to oyster-dredgermen to dredge for oysters in the said fishery, under usual or accustomed payments or fees, as in the first and second counts of the declaration in that behalf alleged,—thirdly, that, from time whereof the memory of man was not to the contrary, until the passing of the said act in the declaration mentioned, there were no usual or accustomed payments or fees under which the said burgesses in the said act mentioned granted licenses to persons to dredge for oysters in the said fishery,—fourthly, that the plaintiff was not entitled to demand or have from the defendants a license to dredge and \*take oysters [\*640 in the said fishery under a usual or accustomed payment or fee, nor was he personally interested therein,—fifthly, that the said mayor and commonalty did not accept the said letters-patent as was in the first and second counts respectively alleged.

The defendants demurred to each of these counts, the ground of demurrer stated in the margin being, “that the count does not show any right in the plaintiff to a license under any usual or accustomed fee.” Joinder.

The plaintiff also demurred to the third plea, the ground of demurrer stated in the margin being, “that the fees in question need not have been immemorial, in order to sustain the claim to a license.” Joinder.

*Lush, Q. C.* (with whom were *J. Brown* and *Philbrick*), for the plaintiff(a)—The first question arises upon the right set out in the first count of the declaration. That applies to the act of 31 G. 2, passed at the time the corporation of Colchester had ceased to exist. The title of the act is, “An act for regulating, governing, preserving, and improving the oyster-fishery in the river Colne and waters thereto belonging.” The \*preamble recites that “the oyster-fishery [\*641 in the river Colne (describing it) hath from time immemorial belonged to and been under the jurisdiction of the burgesses of the borough of Colchester, which said fishery was by certain letters-patent under the great seal of England in the 1 Ric. 1, granted and

(a) The points marked for argument on the part of the plaintiff were as follows:—

“1. That both counts show that the plaintiff had a right under the act of 31 G. 2, to a license to dredge and take oysters in the fishery in question, on payment of the usual and accustomed payments and fees mentioned in the act:

“2. That the said act of parliament estops and precludes the defendants from denying that there were such usual and accustomed payments and fees:

“3. That the fees and payments in question need not have been immemorial, in order to sustain the plaintiff's claim; and that it is enough that they were the usual and accustomed payments and fees at the time when the act passed:

“4. And that the third plea was therefore bad and the declaration good.”

C. B. N. S., VOL. XVII.—25

confirmed to the burgesses of the said borough, and in the 1 Ric. 2 was confirmed to the bailiffs and burgesses of the said borough, and in the first year of the reign of Edward 4 was granted and confirmed to the bailiffs and commonalty of the said borough, and which said fishery was also by other letters-patent under the great seal of England in the 15 Car. 2 and in the 5 W. 3 further confirmed to the mayor and commonalty of the said borough, together with all their prescriptive rights; that the said mayor and commonalty, and their predecessors, have for time immemorial, as well by virtue of their prescriptive rights, as of the said letters-patents, granted licenses to oyster-dredgers to dredge and take oysters in the said fishery, and have held courts which have been commonly called Admiralty Courts at, &c., and made rules and orders for governing and preserving the said fishery, and at such courts offenders and trespassers upon the said river and fishery have been, upon presentments, punished and fined; that the said mayor and commonalty and their predecessors have also from time to time appointed a water-serjeant or bailiff, who exercised a power and authority of entering and going on board the boats and vessels of the fishermen and dredgermen, and of viewing and measuring the oysters, and when any quantity of oysters more than was allowed by such rules and orders have been taken, or if the oysters were undersized, or any brood of oysters or spat was taken away with the culsh, such water-serjeant or bailiff has seized and put \*642] such oysters, brood, and \*culsh back again into the said river and creeks; that, by several judgments lately obtained in Q. B., upon informations in the nature of quo warranto against several persons exercising the offices of mayor and aldermen within the said borough, and by virtue of their offices and charters claiming to be and exercising the office of justices of the peace within the same and the liberties thereof, such persons have been respectively ousted of the said several offices, so that there now remains no mayor, aldermen, or justices of the peace, nor any person or persons to hold the said Courts of Admiralty, or to make and establish any necessary rules and orders, or to enforce such as have been formerly made for the government and preservation of the said fishery; that many disorderly persons have, in contempt of the rules and orders made and established by the said mayor and commonalty and their predecessors, entered the said fishery before the times appointed for opening the same, and have caught great quantities of oysters more than their due, and taken the brood and undersizeable oysters at a time when they should be preserved, and have also taken and carried away the culsh upon which they cast their spat; and that, if such practices are not prevented, the said fishery will be ruined and destroyed." The 1st section then enacts, that, "from and after the passing of this act, it shall and may be lawful to and for the justices of the peace for the time being for the said county of Essex residing within the said borough of Colchester or the liberties thereof, or within the Colchester division of the said county of Essex, or any three or more of them, and they were thereby authorized and required, once or oftener in every year, to keep and hold the said court commonly called the Admiralty Court as aforesaid at the said Blockhouse or at some other convenient place within the aforesaid

\*jurisdiction, and from time to time to appoint a water-serjeant or bailiff and such other officers as they shall think necessary, [\*643 and to grant licenses to such oyster-dredgerman or oyster-dredgermen as shall apply for the same, under the usual and accustomed payments and fees, and in such manner as the said mayor and commonalty or their predecessors have heretofore used to grant such licenses, to be paid in manner thereafter mentioned; and also from time to time to issue out summonses to the licensed dredgermen of the said fishery, at least eight days before the holding of such court, to attend at the same; and in case any such dredgerman refuses or makes default to appear at any such court pursuant to such summons, not having a reasonable excuse, to be allowed by the said justices or the major part of them so assembled, it shall and may be lawful to and for the jury at the said courts, or the said justices, in default of the appearance of a sufficient and proper number whereout to impanel a jury, to impose upon any such dredgerman for non-appearance on [or] non-attendance at such court upon such summons the sum of 10s.; and the said justices assembled at such courts, or the major part of them so assembled, shall and may from time to time, at such courts, as often as shall be necessary, cause their water-serjeant or bailiff to impanel and return a jury, &c.; and such jury, so sworn, may and shall from time to time, as often as shall be necessary, at such courts, or any adjournment thereof, make, frame, and set down in writing and sign such rules and orders for limiting the times when the said fishery, or any part or parts thereof, within the limits aforesaid, shall or may be opened, and oysters taken therein," &c., &c. Section 2 enacts, that, "if any person or persons not being licensed by the said court shall at any time enter the said fishery, and dredge for or take oysters \*therein, every such person shall forfeit 5*l.* for every [\*644 time he shall commit such offence." By the 4th section it is enacted "that all the payments and fees for granting licenses, and also all fines, penalties, and forfeitures hereinbefore mentioned, and to be set and imposed by the said jury or justices at any of the said courts shall be paid, to the said justices, and, after a reincorporation of the said borough, to the chief magistrate thereof, or to such person or persons as such justices, or any three or more of them, assembled at such courts, or such chief magistrate, respectively, shall appoint to receive the same,—in trust that the same shall be applied in the first place in payment of the necessary charges of obtaining this act, and afterwards that such payments and fees for granting licenses shall be paid upon demand to the assignees of the mortgagee of the estates of the late mayor and commonalty, or the lessee or lessees of such assignees for the time being, subject to redemption of such mortgaged estates," &c. And by the 5th section it is enacted and declared "that the powers and authorities hereby given to the justices of the peace residing within the said borough of Colchester and the liberties thereof, and within the Colchester division of the said county, shall continue and be in force only and until His Majesty, his heirs or successors, shall please to reincorporate the said town and borough of Colchester; and that, from such incorporation, all the powers and authorities hereby vested in the said justices shall cease to be in such justices, and shall from thenceforth be and remain in such body corporate, for

the uses aforesaid, by whatsoever name or style they shall be called; and all the other powers, matters, and things hereby enacted, shall stand ratified and confirmed to such corporation." All the rights, powers, and duties which were by the act vested in the justices, by the

\*645] *reincorporation of the borough devolved upon the defend-  
anta.* During the period that the corporation was suspended every dredgerman had a right to demand a license on payment of the customary fees. The justices had no discretion: neither have the mayor, aldermen, and burgesses now. The duty cast upon them is, to regulate the fishery: the profits belong, and always have belonged, to the dredgermen. [BYLES, J.—Is there any limit to the number of dredgermen?] There is none contained in the act. It is admitted on the record that the old corporation had from time immemorial held the fishery and granted licenses. The right to the license is coeval with the rights of the corporation over the fishery. They by their reincorporation take it from the Crown subject to the rights of the dredgermen. Their title is based upon the statute of 31 G. 2. Suppose they take it by their ancient title,—the preamble of the statute shows what that was. Whether, therefore, we refer to their ancient title or to the powers conferred upon them by anticipation by the act of parliament, we find that the dredgermen are the persons who have always enjoyed the substantial profits of the fishery. [ERLE, C. J.—Do you find any instance of an undefined body having rights like this, with no limitation either as to place or number?] The claim was as general in *Tyson v. Smith*, 9 Ad. & E. 406 (E. C. L. R. vol. 86), 1 P. & D. 307.(a) There, in trespass for breaking and entering the plaintiff's close, and erecting stalls, booths, &c., there, the defendant justified under a custom, that, at fairs holden at certain times of the year on some part of the commons and wastes of the manor (the locus in quo being parcel of such commons and wastes, \*646] and named by the lord), *every liege subject exercising the trade of a victualler* might enter at the time of the fairs, and, for the more conveniently carrying on his said trade, erect a booth, &c., and continue the same for a reasonable time after the fairs, paying 2d. to the lord. It was objected, in argument, that the right as claimed was too large,—in an undefined body,—whereas it should be confined to individuals of a particular class or description. But the court held that the custom was reasonable, and the plea a good justification in trespass brought by the owner of the soil. [BYLES, J.—In whom is the soil vested here?] It may be, that, by the grant of the fishery, the soil passes.(b) [BYLES, J.—Is a right to fish a profit a prendre?] Yes. At all events, the right to make oyster-beds would be. The same question was raised in *Rogers v. Brenton*, 10 Q. B. 26 (E. C. L. R. vol. 59). [ERLE, C. J.—There, the claim of the tinbounders was held to be too vague.] The court must, before they hold this custom bad, be satisfied that there is some rule of law which prevents it from being good. [BYLES, J.—The statute says (s. 1), that the justices are "to grant licenses to such oyster-dredgermen as shall apply for the same, under the usual and accustomed payments and fees, and in such

(a) See the case in the court below, 6 Ad. & E. 745 (E. C. L. R. vol. 33), 1 N. & P. 784.

(b) See *The Free Fishers of Whitstable v. Gann*, 11 C. B. N. S. 387 (E. C. L. R. vol. 103), in error, 13 C. B. N. S. 853 (E. C. L. R. vol. 106).

manner as the said mayor and commonalty or their predecessors have heretofore used to grant such licenses." The question is, who are the parties who are to have licenses?] There is no limitation in the act as to number: and, if there be any qualification by reason of birth, residence, or apprenticeship, the declaration sufficiently avers that the plaintiff is within it. It is enough to say that the general description is as much indicative of a specific calling as that of a victualler in *Tyson v. Smith*. [BYLES, J.—The right there was not claimed under an act of parliament.]

\*Then, as to the third plea. That alleges, that, from time whereof the memory of man was not to the contrary, until the [\*647 passing of the act in the declaration mentioned, there were no usual or accustomed payments or fees under which the said burgesses in the act mentioned granted licenses to persons to dredge for oysters in the said fishery. Clearly that affords no answer to the action. If there were no usual and accustomed fees, the corporation could only take a *reasonable* fee, or perhaps none at all. But the statute in the recital states that the mayor and commonalty have for time immemorial granted licenses: and by the enacting part of s. 1 the justices are to grant licenses "to such oyster-dredgers as shall apply for the same, *under the usual and accustomed payments and fees.*" and by s. 5, all the powers and authorities thereby given to the justices were to cease to be in such justices, and thenceforth be and remain in the corporation.

*Petersdorff*, Serjt. (with whom was *R. E. Turner*), for the defendants.(a)—The rights of the corporation are \*wholly unaffected [\*648 by the act of parliament. Looking to its preamble and the nature of its enactments, it is plain that it was designed for a temporary purpose only, viz. to relieve parties from the difficulty they might be placed in by reason of the powers of the corporation being suspended. The act of parliament by its recital admits the immemorial rights of the corporation, antecedent even to the time of Richard 1, and confirmed by successive sovereigns down to William 3. It appears that in the year 1740, the officers of the corporation had been removed by quo warranto, and that there consequently remained no person to represent the corporation or protect the fishery. To provide for this emergency, and mainly to protect the rights of the assignees of a mortgage upon the property of the corporation, it became necessary to appoint some temporary governing body. Certain

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the corporation, when reincorporated by the charter of 3 G. 3, were not bound by the provisions of the 31 G. 2:

"2. That, when reincorporated by the charter, the corporation resumed their ancient and immemorial rights and jurisdiction over the fishery:

"3. That the first and second counts of the declaration are bad for not showing that there was at the time the act of G. 2 was passed, any usual or accustomed payments for licenses to dredge:

"4. That the right alleged in the declaration is unreasonable and too vaguely stated; that it is not stated who the dredgers are,—whether or not they are an incorporated body or the inhabitants of a particular district, or in any way limited in number or otherwise:

"5. That the right claimed in the declaration is bad in law, even if it had existed from time immemorial, which is not averred in the declaration:

"6. That the third plea is good in law; that the right claimed, even if a legal right in itself, is void for uncertainty, unless it has existed from time immemorial; and that no other meaning can be put upon the term '*usual and accustomed.*'"



powers were accordingly given to the justices residing within the borough or within the Colchester division of the county of Essex. The powers and authorities given to the justices for this special and limited purpose ceased when on the revival of the corporation its original rights were restored. This question was virtually decided in *The Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 339 (E. C. L. R. vol. 53). There, the act of parliament and all the charters were fully considered, and the Court of Queen's Bench decided that the fishery was in the corporation by virtue of its immemorial rights, and that those rights were not affected by the temporary abeyance, \*649] but that the effect of the charter of reincorporation of 1763, was, to restore to them all the powers, rights, and privileges which they held before the suspension. Lord Denman, in delivering the judgment of the court, says, p. 382,—“The plaintiffs rely upon a distinction between the dissolution of a corporation and the suspension: and they cite the decision of this court in the case of this very corporation against Seaber, to be found in 8 Burrow and 1 Blackstone.(a) That was an action brought in 1766 by the body corporate under the new charter, on a bond given to the body corporate under the old charters: and the court held that the action was maintainable, taking a distinction between total dissolution, as upon forfeiture after proceedings against the corporation itself, and mere inability to continue its existence upon the death of members, or proceedings against them ending in ouster. In the latter case, they treated the corporation as in abeyance, dormant or suspended, and held that a new charter incorporating by the same name, and giving the same constitution, did not create a new, but only revived or called again into activity the old body corporate. This case was very much considered in that of *Rex v. Pasmore*, 3 T. R. 199, both in the very able argument at the Bar, and in the judgments delivered from the Bench. It may be collected from the language of the judges, perhaps, that they did not approve of all the expressions made use of by the court in it: but, taking the court to have admitted that *for some purposes at least* the corporation had been dissolved, they did not find fault with the decision itself. Whatever doubts, therefore, we might entertain as to the soundness of the distinctions relied on by Lord Mansfield, \*650] if this matter were now to be decided for the \*first time, we do not feel ourselves at liberty to overrule this decision, and must therefore inquire whether it governs the present case. Lord Kenyon states the effect of the decision to be this. ‘Lord Mansfield’ (says he) ‘did not say in that case that the corporation could act, or that it was not dissolved *to some purposes*: but only that the King might renovate it, and, when renovated, all the former rights would revive and attach on the new corporation, and amongst others the right of suing on the bond given to the old corporation.’ Now, this judgment cannot stand on the supposition of the Crown having by the new charter incidentally granted the chose in action which the corporation before its dissolution had; for, that chose in action never was in the Crown: the Crown never could have sued upon the bond. In the case of mere dissolution, as by the death of all the members, the

(a) *The Mayor, &c., of Colchester v. Seaber*, 3 Burr. 1866; *The Corporation of Colchester v. Seaber*, 1 Sir W. Bl. 591.

real property of a corporation does not escheat to the Crown, but reverts to the donor or his heir: Co. Litt. 13 b. In the case of liberties, in order to revest them in the Crown, there should be a judgment of seizure, or ouster at the least, against the corporation: *Rex v. The Mayor of London*, 1 Show. 174, 180. Except by reverter or seizure, we do not see how the right could pass to the Crown: and there was no pretence for either in that case. Nor, if the right were actually extinct and gone, could the Crown have created it anew; for, that would have been to affect third parties: it must, therefore, be taken to have continued in existence during the period of abeyance, so that the corporation, upon its revival, sued in virtue of its ancient right, suspended, but never destroyed." It is clear, therefore, that, when the corporation was restored by the charter of 1768, it possessed all the rights and privileges which belonged to it under its ancient charters. [ERLE, C. J.—Assuming that the \*reincorporation operates a [\*651 revival of all the powers of the old corporation, is not the allegation in the declaration, that the plaintiff was entitled to demand and have a license to dredge and take oysters in the said fishery under the usual and accustomed payments and fees, admitted?] The claim is based upon the act of parliament. The dredgermen can only be entitled to licenses *according to the immemorial custom*. The corporation is not bound by the act of parliament. The question is, whether there ever was any fixed and ascertained immemorial fee. The necessities of the fishery would manifestly call for a different fee at different times and under different circumstances. [BYLES, J.—Does Mr. Lush contend that the declaration would be good without the act of parliament? *Lush*.—The plaintiff relies upon the recitals in the act.] Unless an immemorial right is alleged in the declaration, and proved at the trial, the third plea is a good answer to the action. [ERLE, C. J.—The corporation grant dredging licenses. What is there to show an *obligation* on them to grant them, because they have always *thought fit* to do so?] There is no obligation whatever upon them; at all events, not at a fixed sum. [BYLES, J.—The difficulty I feel is, in seeing, without the act of parliament, any obligation imposed upon the corporation. In the clause (s. 5) which deals with the transfer to the new corporation of the powers and authorities vested by the act in the justices, there is a total absence of words of requirement.] No fresh duty or obligation is cast upon the defendants by the act of parliament. [ERLE, C. J.—If the plaintiff's right fails under the act of parliament, the parties may settle an issue between themselves to raise the question of fact.] Assuming that there is no obligation on the defendants, except as arising out of the act of parliament, it is impossible to say that the plaintiff can have a right \*based solely on the act, because his claim has reference to the immemorial rights of the corporation. By the enacting part [\*652 of s. 1, the justices were to grant licenses to such oyster-dredgermen as should apply for the same, "under the usual and accustomed fees, and in such manner as the said mayor and commonalty, or their predecessors, had theretofore used to grant such licenses." So that the plaintiff's right cannot be separated from the obligations and duties of the corporation. If the granting of licenses was discretionary in the corporation before the act, it is discretionary now.

[ERLE, C. J.—The sole question is, whether the corporation, when reinstated, are by the act required to do that which the justices were required to do. BYLES, J.—There may be good reason why the carrying out the duties imposed upon them by the act should be made compulsory on the justices. If a discretion as to the imposition and levying of fines were left to them, they might decline to exercise it. The corporation would have an interest in the matter.] An act of parliament which contains only affirmative words cannot be construed so as to destroy ancient customs.

*Lush, Q. C., in reply.*—The statute casts upon the corporation the obligation of granting dredging licenses upon payment of the fee which was usually and customarily payable at the time the act passed. The object was, to preserve and restore a valuable fishery. It may be fairly collected from the preamble that the corporation were under an obligation to do what by the enacting part the justices were required to do for the purpose of carrying that object into effect. The justices are "authorized and required" to hold an Admiralty Court, to appoint a water-serjeant or bailiff, and to grant licenses "to such oyster-dredgemen as shall apply for the same, under the usual and \*653] accustomed payments and fees, and in such manner as the said mayor and commonalty, or their predecessors, had theretofore used to grant such licenses." They have no discretion to select, or to limit the number, or to vary the amount of the fee. The words "in such manner," &c., merely point to the *modus operandi*, and do not refer to the conditions under which the thing is to be done. Then, what meaning is to be given to the words of the proviso in s. 5,— "Provided always, and it is hereby further enacted and declared, that the powers and authorities hereby given to the justices shall continue and be in force only and until the reincorporation of the said borough; and that, from such incorporation, all the powers and authorities hereby vested in the said justices shall cease to be in such justices, and shall from thenceforth be and remain in such body corporate"? [ERLE, C. J.—Under the act the justices had certain *powers and authorities* to exercise, and certain *duties* to perform. When the borough should be reincorporated, all the *powers and authorities* vested by the act in the justices were to become vested in the new corporation.] The duty to grant licenses is necessarily involved in the power and authority to do so. The state of things declared or created by the statute is to be continued by the new corporation. Certain powers are given to the corporation under the act which they did not possess before; for instance, the power to fine the dredgemen for non-attendance when summoned on the jury, and to administer an oath to the jurymen. Suppose the payment had been uniform,—say 10s. 6d. for each license,—would it be competent to the corporation to say, "The fishery is ours; and, though our burgesses cannot fish, and none but a licensed dredgeman can fish, we will put such a price upon future licenses as will virtually take the profits of \*654] the fishery out of those for whose benefit it has been preserved, and vest them in the corporation"? In *The Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 339 (E. C. L. R. vol. 53), no mention was made of the statute at all.

ERLE, C. J.—This is an action brought by a dredgeman of Col-

chester against the corporation of that borough, in order to enforce a supposed right to demand a license to dredge for and take oysters in the Colne fishery, under the "usual and accustomed payments and fees." It is perfectly clear from the preamble of the 31 G. 2 that the corporation of Colchester is one of very great antiquity, with very extensive rights, authorities, and duties; and that, in the year 1740, those rights, authorities, and duties became suspended in consequence of several of its members having been ousted by quo warranto,—not absolutely and for ever extinguished, but suspended as to the exercise of its municipal functions until it should please the Crown to revive and reincorporate it by a new charter. I will take it, for the purposes of the day, that the new corporation revived by the charter of 1763 stand possessed of all the rights coming down to them from the old corporation. What may have been the rights of the dredgermen under the old corporation, I do not stop to consider. But, after the lapse of the old corporation, and before its reconstruction, the statute in question passed, putting the justices of the peace ad interim in the place of the suspended corporation, and imposing on them the obligation "to grant licenses to such oyster-dredgermen as should apply for the same, *under the usual and accustomed payments and fees*, and in such manner as the corporation, or their predecessors, had theretofore used to grant such licenses." By a subsequent section, it was expressly enacted, that, when it should please the Crown to \*reincorporate the borough, the *powers and authorities* thereby vested [\*655 in the justices should cease, and should from thenceforth be and remain in such corporation. The justices were *required* by the statute to grant licenses: the duty to do so was thereby cast upon them. The only question which my judgment goes to, is, whether the effect of the statute is, to create a duty in the new corporation to grant licenses in the manner the justices were required to do while acting ad interim. The case has been argued by Mr. Lush with his usual ability. But I cannot find that this statute has created any new liability in the corporation to grant licenses which it was obligatory on the justices during the interval to grant. The statute recites the original grant of the fishery to the corporation, and various subsequent confirmations; that the corporation and their predecessors had for time immemorial, as well by virtue of their prescriptive rights as of the said letters patent, granted licenses to oyster-dredgers to dredge and take oysters in the said fishery, and held Admiralty Courts, and made rules and orders for governing and preserving the said fishery, &c.: but nothing is said about the fees payable for such licenses. It then goes on to recite, that, by reason of proceedings in the Court of King's Bench, there was no mayor, &c., nor any person to hold courts or make rules, and that certain malpractices had ensued which if not prevented would ruin and destroy the fishery. The statute then proceeds to enact that it should be lawful for the justices residing within the borough, or within the Colchester division of Essex, and they were thereby authorized and *required*, to hold courts, to appoint a water-bailiff, &c., and "to grant licenses to such oyster-dredgermen as should apply for the same, *under the usual and accustomed payments and fees*, and in such manner as the said mayor, &c., or their [\*656 \*predecessors had theretofore used to grant such licenses." It

seems to me that the statute has purposely given authorities to and imposed obligations upon the justices during the time the corporation should remain in abeyance, and that its operation was to cease when the corporation should be revived. The words of the proviso contained in s. 5 are, that the *powers and authorities* thereby given to the justices should continue and be in force only until His Majesty, his heirs or successors, should please to reincorporate the borough, and that, from such incorporation, all the *powers and authorities* thereby vested in the justices should cease to be in them, and should thenceforth be and remain in the body corporate. When the borough comes to be reincorporated, it is reincorporated with all the rights, powers, and authorities, and all immemorial obligations it originally had and exercised; but the statute is silent as to transferring to them any statutable duties and obligations imposed upon the justices by the 1st section. In the mind of a lawyer, powers and authorities are clearly distinguished from duties and obligations. The former s. 5 intended to pass, the latter not. Then come the more general words, "and all other powers, matters, and things hereby enacted shall stand ratified and confirmed to such corporation." This, I think, means the same as "powers and authorities," and was not intended to impose upon the corporation any new obligation, but the legislature is treating them as in the nature of grantees. It is widely different from language imposing that which would be an immensely operative contract, limiting the corporation to the receipt of usual and accustomed fees. I cannot think the legislature had any such intention. If the corporation are bound to grant licenses upon payment of any immemorial fee, be it so: but the statute does not establish anything of the kind.

\*657] **\*BYLES, J.**—I am entirely of accord with my Lord as to the construction of the statute. One can clearly see a right in the corporation (probably prescriptive) to grant licenses. It is conceded, and properly conceded, that, however the fact may be, upon this record we can only deal with usual and accustomed payments and fees under the statute. The Lord Chief Justice has given his reasons why the statute does not help the plaintiff in this respect; and I will not repeat them. I was somewhat struck with the argument that "powers and authorities" implies "duties" to be performed by those to whom are confided the powers and authorities. But the answer is, that, reading those words in their literal sense in both parts of the statute, they clearly could not have been intended to impose upon the corporation obligations which did not exist under the old state of things. I cannot help feeling that this construction is the most reconcilable with the intention of the framers of the act, because of the extreme improbability of the legislature dealing in this indirect way with corporate rights. I therefore think that the defendants are entitled to judgment on this point.

**KEATING, J.**—I am entirely of the same opinion. It is impossible to read the recitals and the various subsequent provisions of the act, without seeing that the legislature contemplated at the time of its passing the reincorporation of the borough, which was then suspended, and merely intended to provide for what may be called the interregnum. The old corporation was not dissolved by the proceedings

against some of its members in the Court of Queen's Bench. Those operated merely as a temporary suspension of the corporate functions. The powers and duties necessary to provide for the preservation of the interests of the \*borough and the fishery during the inter- [\*658 val, must necessarily be conferred upon some acting body. This was all the act was passed for. There was no intention to interfere in any way with the rights or the obligations which were vested in or imposed upon the old corporation. No new statutory obligation is cast upon the new corporation by the act. The declaration, therefore, is bad, and there must be judgment thereon for the defendants.

Judgment for the defendants.

*Lush* asked leave to substitute a count founded upon the immemorial custom. To this the court assented. Rule accordingly.

### MITCALFE v. WESTAWAY. Nov. 26.

A railway company, being possessed of a ship-yard in which was a "slip" for docking vessels, by indenture demised the yard to B., subject to the following reservation:—

"Except and always reserved out of this demise the patent slip (as shown on a plan), and the machinery and apparatus connected therewith, and the site thereof, and the dues and payments payable for the use thereof, and except and always reserved unto the said company, their successors and assigns, officers, servants, and workmen, free access at all times to and from the said slip, for the purpose of working and using or repairing the same, or otherwise:"—

Held, that it was competent to the company to grant "licenses" to persons to use the slip, on payment to them of certain dues; and that the right of access to and using the slip was not limited to persons claiming to exercise it in the character of "assigns" of the company, in the strict sense.

THIS was an action of trespass. The declaration stated that the defendant, on divers days and times broke and entered certain land of the plaintiff's, which the plaintiff described as land on each side of a certain slip, and as abutting on the south side thereof on Lowestoft harbour, and placed on the said land of the plaintiff on each side of the said slip divers tools, utensils, and shipwrights' gear, pitch-pots, pieces of timber \*and wood, and other goods and [\*659 materials, and braziers and stoves, and kept the same there for long times, and therewith greatly encumbered the said land of the plaintiff, and with the feet of divers persons walked and trampled on the said land of the plaintiff on each side of the slip, and with the wheels of carts and feet of horses trespassed and trampled upon the said land of the plaintiff on each side of the said slip, and seized divers pieces of timber and wood and other goods of the plaintiff, and carried the same away, and threw the same about, and by so doing greatly incommoded the plaintiff, and prevented him from carrying on his business of a ship-builder and repairer of ships in so beneficial a manner as he otherwise would have been able to do, &c.

The defendant pleaded, that, before the plaintiff was possessed of or had any title, estate, or interest in the said land, the then Eastern Counties Railway Company, now called the Great Eastern Railway Company, were and still are seised in their demesne as of fee of and in the said land, and also of and in certain land and premises called and used and to be used as a slip; and, being so seised, they by a

deed made between them of the one part, and William Stephen Andrews of the other part, demised and leased the said land in which, &c., to the said W. S. Andrews, To hold the same to him for a certain term therein mentioned and not yet expired; the said company excepting and reserving out of that demise the said slip shown and distinguished by the letter A. in a map or plan drawn in the margin of the said deed, and the machinery and apparatus connected therewith, and the site thereof, unto the said company, their successors and assigns, officers, servants, and workmen, free access at all times to and from the said slip, for the purpose of working and using or \*660] repairing the same, or \*otherwise; and which said deed was and is in the words and to the tenor following, that is to say, "This indenture, made the 25th day of March, 1856, between The Eastern Counties Railway Company of the one part, and William Stephen Andrews, of Lowestoft, in the county of Suffolk, of the other part, witnesseth, that, in consideration of the rent hereinafter reserved, and of the covenants, stipulations, and agreements hereinafter contained on the part of the said W. S. Andrews, his executors, administrators, and assigns, to be observed and performed, The Eastern Counties Railway Company do hereby demise and lease unto the said W. S. Andrews, his executors, administrators, and assigns, all that piece or parcel of land situate, lying, and being at Lowestoft aforesaid, adjoining or near to the harbour there, now and for some time past used as a ship-yard, together with the buildings, workshops, sheds, and other erections now standing and being thereon, as the same are particularly delineated and shown in the map or plan in the margin of these presents, and thereon coloured pink, together also with all and singular the rights, members, easements, and appurtenances to the said piece of land, ship-yard, and premises belonging or in anywise appertaining, as the same are now in the occupation of the said W. S. Andrews, except and always reserved out of this demise the patent slip shown and distinguished by the letter A. in the said map or plan, and the machinery and apparatus connected therewith, and the site thereof, and the dues and payments payable for the use thereof, and except and always reserved unto the said company, *their successors and assigns, officers, servants, and workmen, free access at all times to and from the said slip*, for the purpose of working and using or repairing the same, or otherwise), to have and to hold the said piece of land, \*661] yard, erections, buildings, and \*premises hereinbefore demised, or expressed and intended so to be, unto the said W. S. Andrews, his executors, administrators, and assigns, henceforth for and during and unto the full end and term of twenty-one years, computed from the 25th day of March, 1856: yielding and paying," &c., &c. [Then followed a number of covenants not material to the present question]: Averment, that the said company, before and at the said times when, &c., gave and granted to the defendant their *license and permission* to work and use the said slip, and he at the said times when, &c., worked and used the same under such *license and permission*, and the trespasses complained of were a use and exercise by him of the said right and power so excepted, reserved, and given by the said deed: and, because the defendant could not have free access to and from the said slip for the purpose of working and using it, with-

out entering and going on the said land on which, &c., and without placing on the said land on each side of the said slip the said tools, &c., and keeping the same there, and without the defendant and his servants in that behalf employed by him for working and using the said slip walking on the said land on each side of the said slip, and without going and passing on the said land with carts and horses on each side of the said slip, and without seizing and removing and carrying away to a small distance and a little throwing about the said timber, wood, and other goods of the plaintiff, the defendant did, for the purpose of having free access to and of working and using the said slip under the *said license and permission*, and in the lawful exercise of his rights and powers in that behalf, enter and go on the said land on which, &c., and place thereon as aforesaid the said tools, &c., and keep the same there as aforesaid, and by himself and his said servants walk on the said land on each side of the said \*slip, and go and pass on the said land with carts and horses on each side of the said slip, and with the wheels of the said carts and feet of the said horses trample on the said land on each side of the said slip, and seize the said pieces of timber and wood and other goods, and carry the same away to a small and convenient distance, and a little throw them about, and there leave them for the plaintiff's use, as he lawfully might for the cause aforesaid, doing no more and nothing else but what he was entitled to do; and which are the trespasses complained of. [\*662]

The plaintiff demurred to this plea; the ground of demurrer stated in the margin being, "that a licensee of the company cannot exercise the rights reserved on the plaintiff's land." Joinder.

*Keane, Q. C.* (with whom was *Douglas Brown*), in support of the demurrer.(a)—The exception out of the \*demise to the plaintiff by the Great Eastern Railway Company operates as a re- grant to the company of the slip, and a right for them and their successors and assigns, officers, servants, and workmen, of free access at all times to and from the slip for the purpose of working and using or repairing it. The plaintiff, as licensee, is not a successor, or assign, or an officer, servant, or workman of the company. The rights of a licensee are well defined in *Com. Dig. Common* (F. 2), where it is said that "he who has common appendant, or appurtenant for cattle levant [\*663]

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That a mere licensee of the company has no right to enjoy the easement on the land demised to the plaintiff:

"2. That the exception of the slip by itself could confer no easement except a right of way of necessity; and this would not entitle the lessor to any onstand on the land demised for the purpose of using the slip:

"3. That, if anything more is claimed than a right of way of necessity, it must be under the so-called exception and reservation of free access for the purpose of working, using, or repairing the slip; and the class of persons to whom such free access is given does not include a licensee:

"4. That the right is only reserved, to be exercised by the company and their assigns (meaning by assigns those to whom the company assign an estate in the slip), and by the officers, servants, and workmen of the company and their assigns, that is to say, by those who are employed by the company or their assigns, and who act for them; and this a licensee does not do, as he acts on his own behalf, for himself:

"5. That the expression 'the company, their successors or assigns,' frequently occurs in the lease, and must receive the same construction throughout."



and couchant, cannot use the common with the cattle of a stranger; nor can he license his tenants at will to put their cattle there; nor can he use the common with cattle which he agists, or which he has to sell." If the commoner could give a license to a stranger, it would interfere with the enjoyment of the rights of others. So, if the company could grant a license to anybody to use the slip, it would be using the plaintiff's land for a purpose which he could never have contemplated when he agreed to take the lease. If the reservation had been simply of the slip, a right of way of necessity might have passed with it. But here the way is granted in a limited manner, describing the persons by whom the right is to be exercised. If the licensee was a servant of the company, it should have been so alleged. Licenses may be granted to an indefinite number of persons. [ERLE, C. J.—What difference can the form of the instrument make to the plaintiff. I presume there would be no objection to the company assigning the slip for the time requisite to repair one vessel, and then another.] If I have an assign, I know how to deal with him. A \*664] mere license, whether by deed or \*by parol, is revocable: see the judgment of Alderson, B., in *Wood v. Leadbitter*, 18 M. & W. 838, 844. In the notes to *Armory v. Delamirie*, 1 Stra. 505, in 1 Smith's Leading Cases, 5th ed. 804, it is said: "It may perhaps be laid down generally, that to rights lying in grant, and not susceptible of possession or seisin, there can be no title as against a wrongdoer where there is none against the party capable of granting such rights; excepting only where the right claimed is a natural incident of property which is in the possession of the claimant. Thus, as a mere license confers no right at common law against the licensor, but only excuses that which, if not done under the license, would have been a wrong to him (*Wood v. Leadbitter*), the licensee of that which might have been conferred as an easement or profit à prendre, cannot, it is apprehended, maintain an action against a wrongdoer for depriving him of the benefits which he might or would have enjoyed under the license. This subject was discussed in *Whaley v. Laing*, 26 Law J., Exch. 827, 2 Hurlst. & N. 476."

*Bovill, Q. C.* (with whom was *O'Malley, Q. C.*), contra. (a)—A license \*665] is always an excuse for a trespass. \*But the question here arises upon the construction of the lease under which the plaintiff holds. The subject-matter of the demise is a ship-yard. In it is a slip. The yard is demised to the plaintiff, the indenture containing an exception of the slip. If there had been nothing more, all things necessary for the free use of the slip would have remained vested in the lessors, not only for themselves, but also for every person who came there by their permission for the purpose of using the slip. The

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the defendant was under the license and permission of the Great Eastern Railway Company entitled to use the rights in the exercise of which the alleged trespasses were committed:

"2. That the Great Eastern Railway Company were after the execution of the deed set out in the plea the absolute owners of the slip, and of all the rights necessary to the full enjoyment of the same; and that the defendant was entitled to use such rights, as their licensee:

"3. That such ownership and such rights were excepted or reserved by the deed set out in the plea; and that the defendant was entitled to use such rights as their licensee."

conveyancer, however, has added, for greater caution,—“and the machinery and apparatus connected therewith, and the site thereof, and the dues and payments payable for the use thereof, and except and always reserved to the said company, their successors and assigns, officers, servants, and workmen, free access at all times to and from the said slip for the purpose of working and using or repairing the same, or otherwise.” In Sheppard's Touchstone 89, it is said: “When anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also, and shall pass *inclusive*, together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, or any such like words. *Cuiusque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*. As, by the grant of consuance of pleas, is granted the ordinary process to bring causes to judgment. By the grant of a ground is granted a way to it [*i. e.*, all usual ways; and, unless there be an usual way, then a way of necessity will pass: Shep. Abr. 4 part, 200; B. N. P. 74; F. N. B. 188; Com. Dig. *Chimin* (D. 2); *Howton v. Frearson*, 8 T. R. 50; *Surrey v. Piggot*, Latch 153]. By the grant of trees is granted withal [unless the right of cutting be restrained, and it may be restrained so as to preserve them for ornament, &c.] power to cut them down and take them away. By the grant of mines is granted \*the power to dig them: and by the grant of fish in a man's pond, is granted [\*666 power to come upon the banks and fish for them.” The added words in this exception are words of extension, and not of limitation. The plea shows, that, without committing the alleged trespasses, the slip could not be used. The judgment of Parke, B., in *Dand v. Kingscote*, 6 M. & W. 174, 197, is expressly in point. *Liford's Case*, 11 Co. Rep. 46 b, also contains much learning on the subject. The reservation, if it were necessary to resort to that, of “the dues and payments payable for the use thereof,” removes all doubt: there could be no “dues” payable, unless for the use of the slip by others than the company, their officers or servants. See also the notes to *Pomfret v. Ricroft*, 1 Wms. Saund. 828 (m).

*Keane*, Q. C., in reply.—The exception is limited by the words used: and exceptions are to be construed strictly. This reservation of the slip is not a regrant: it is rather in the nature of an easement,—*The Durham and Sunderland Railway Company v. Walker*, 2 Q. B. 940 (E. C. L. R. vol. 42). There is no dispute about the authorities referred to on the other side. Where a thing is granted, of necessity the grant carries with it that without which the grant could operate nothing. There is a material difference, however, between a grant and a license: *The King v. The Inhabitants of Mellor*, 2 East 189; *The King v. The Inhabitants of Tardebigg*, 1 East 528.

ERLE, C. J.—I am of opinion that the defendant is entitled to judgment. This is an action of trespass for coming upon the land of the plaintiff: and the question turns upon the meaning of an exception out of the demise of the land under which the plaintiff holds. The demise is by the Eastern Counties Railway \*Company (now the Great Eastern Railway Company) to the plaintiff of a piece of [\*667 land described as a ship-yard, adjoining Lowestoft Harbour: and the exception is,—“Except and always reserved out of this demise the patent slip (as shown in a plan), and the machinery and apparatus

connected therewith, and the site thereof, and the dues and payments payable for the use thereof, and except and always reserved unto the said company, their successors and assigns, officers, servants, and workmen, free access at all times to and from the said slip, for the purpose of working and using or repairing the same, or otherwise." I think the effect of the demise, taking it all together, was, that the slip remained (the fee-simple) in the grantors, and consequently they were at liberty to make any use of it, and to exercise dominion over it, by themselves, or by their servants, or by assigns or licensees, in any way in which an owner in fee-simple can exercise acts of ownership over his property. I think we are bound to give effect to the intention of the parties; and that intention manifestly was, to reserve to the lessors the rights I have stated. The earlier words of the exception are plain to that effect; and the additional words, so far from restricting it, were inserted for the purpose of making it more clear that the company reserved the right to use the slip themselves, or to pass their interest therein for the whole or a part of their estate, and consequently the right to assign it or to license others to use it. It clearly was the intention of all parties that the company might make the slip available for earning dues for themselves, or in any other manner they might choose.

BYLES, J.—I am of the same opinion. I think the construction of this exception would have been the same if the word "assigns" had \*668] not been found there. \*All contracts are to be so construed as to give effect to the intention of the parties, even though in some cases this occasions a departure from the strict literal sense of the words used. The slip in question is upon the land demised to the plaintiff; and it is clear that the lessors were in the habit of allowing other persons to use it, and of receiving due therefor. The demise is, of the ship-yard, excepting the slip, and reserving to the grantors "their successors and assigns, officers, servants, and workmen, free access at all times to and from the said slip, for the purpose of using and working or repairing the same, or otherwise." It may be conceded that "officers, servants, and workmen," exclude licensees: but those words would I think be satisfied if the persons using the slip were the officers, servants, and workmen of a licensee. It is plain, that, if the slip were let by the company for a week, the tenant would be an assign for this purpose, and his servants and workmen would be the servants and workmen of the company and their assigns. If the word "assigns" had not been there, the other words would imply this: but that word is there. Are we, then, to give "assigns" the strict literal construction, and hold it to be satisfied only by the grant of such an interest in the slip as would enable the party to maintain trespass? or are we to construe it so as to comprehend an assignee of the right to use the slip for a valuable consideration, by leave of the company, for a given time? I think the latter is the true construction.

KEATING, J.—I am of the same opinion. Looking at the subject-matter of this exception, I think it is impossible that the word "assigns" can have the limited meaning which Mr. Keane seeks to put upon it, viz. an estate in the slip granted to a person by deed.

The \*subject-matter of the exception is not simply the slip, but "the dues and payments payable for the use thereof." [\*669 That plainly contemplates a user of the slip by others than the company, their successors and assigns, officers, servants, and workmen, viz. by persons who would render to the company dues and payments for the use thereof. The construction sought to be put by the plaintiff on the word "assigns" would preclude the company from enjoying what they had reserved to themselves as necessary to the full and free enjoyment of the slip, viz. access thereto, not only by persons having some estate therein, but also by persons using it by their license and permission.

Judgment for the defendants.

### DOGGETT v. CATTERNS. Nov. 24.

Held, that the habitual use of a spot in a public park for the receiving of deposits, to return a larger sum on the contingency of a particular horse winning a race, is the using of a "place" for such purpose, within the prohibition of the 16 & 17 Vict. c. 119, and consequently that the money so deposited might be recovered back by virtue of s. 5 of that act.<sup>(a)</sup>

THIS was an action for money had and received by the defendant for the use of the plaintiff, and for moneys found to be due and owing from the defendant to the plaintiff on an account stated between them: Claim, 20*l*.

The defendant pleaded,—first, never indebted,—secondly, a set-off for work and labour, money paid, and money due on accounts stated,—thirdly, that the money alleged to have been had and received by the defendant for the use of the plaintiff was money deposited by the plaintiff with the defendant under a \*contract or agreement [\*670 by way of wagering and gaming and illegally betting on horses running at races, and the account stated alleged in the declaration was made and stated of and concerning the said money deposited as therein alleged, and not otherwise. Issue thereon.

The cause was tried before the undersheriff of Middlesex on the 30th of June, 1864. The only witness called was the plaintiff himself. In his examination in chief, he stated, that, on the 20th of October last, he was in Hyde Park under a clump of trees; that there were a hundred and fifty or two hundred persons present; that he there saw the defendant, who was betting on races; that he was showing a list and betting the odds on cards printed [one of which was produced and identified]; that he (plaintiff) made a wager with him, backing "Fly-trap" for the Witham Handicap at Lincoln, for the 20th of October, at  $\frac{1}{2}$  past 12: that he (plaintiff) was to receive 6*l*. to 1*l*.; that he deposited 5*l*. 10*s*., and was to receive 38*l*. 10*s*. if Fly-trap won; that he had seen the defendant there before; that he (defendant) was there daily betting on horse-racing; that twenty or thirty others were there doing the same; that Fly-trap did not win; that two days afterwards he told the defendant that the horse was scratched four hours before he made the bet; and that he (defendant) refused to return the money, saying that he "betted all in on the day of the race."

On cross-examination, the plaintiff said he was at the place in

(a) Reversed in the Exchequer Chamber, Hilary Vacation, 1865.

question backing horses, and knew as much about betting as the defendant; that he examined the card, and would not swear that the words "all bets stand on the day of the race, scratched or not," were not there; and that he did not know that the defendant knew that the horse was scratched.

The card referred to had printed on it in large letters "all bets stand on the day of the race, scratched or not."

\*671] "On behalf of the defendant, it was submitted that the plaintiff was not entitled to recover back the 5*l.* 10*s.*, the money having been paid by him upon a contract of gaming and wagering within the meaning of the 8 & 9 Vict. c. 108. For the plaintiff, reliance was placed upon the 16 & 17 Vict. c. 119, which, it was submitted, entitled the plaintiff to recover back his deposit.

The undersheriff directed the jury to find for the defendant, reserving leave to the plaintiff to move to enter a verdict for him for 5*l.* 10*s.*, if the court should be of opinion that the 16 & 17 Vict. c. 119 entitled the plaintiff to recover.

*Yeatman*, accordingly, on a former day in this term, obtained a rule nisi to enter a verdict for the plaintiff for 5*l.* 10*s.*, on the grounds,—first, that there was no risk, the horse being struck out,—secondly, that the Betting House Act, 16 & 17 Vict. c. 119, entitled the plaintiff to recover as for money had and received to his use.

*Talfourd Salter* now showed cause.—The plaintiff is not entitled to recover. The 18th section of the 8 & 9 Vict. c. 109, enacts "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." Here the event did come off, viz., when the horse was scratched. The 16 & 17 Vict. c. 119 has no application. It was passed for a totally different purpose. The title of the act is, "An Act for the

\*672] "suppression of betting-houses." It recites that "a kind of gaming has of late sprung up, tending to the injury and demoralization of improvident persons by the opening of *places called betting-houses or offices*, and the receiving of money in advance by the *owners or occupiers of such houses or offices* or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies:" and, "for the suppression thereof," it proceeds in s. 1 to enact, that "no *house, office, room, or other place* shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other

race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place, opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance, and contrary to law." By s. 2 betting-houses are declared to be "common gaming houses" within the 8 & 9 Vict. c. 108. The 3d section imposes a penalty not exceeding 100*l.* on any person who, being the owner or occupier of any house, office, room, or other place, or a person using the \*same, shall open, keep, or use the same [\*673 &c. The 4th section imposes a penalty not exceeding 50*l.* upon "any person, being the owner or occupier of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, or any person acting for or on behalf of any such owner or occupier, or any person having the care or management or in any manner assisting or conducting the business thereof, who shall receive, directly or indirectly, any money or valuable thing as a deposit on any bet on condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or relating to a horse-race, &c., or as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any such event or contingency, and any person giving any acknowledgment, note, security, or draft, on the receipt of any money or valuable thing so paid or given as aforesaid, purporting or intended to entitle the bearer or any other person to receive any money or valuable thing on the happening of any such event or contingency as aforesaid." And s. 5 enacts, that "any money or valuable thing received by such person aforesaid as a deposit on any bet, or as or for the consideration for any such assurance, undertaking, promise, or agreement as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing, or the value thereof, may be recovered accordingly, with full costs of suit, in any court of competent jurisdiction." [ERLE, C. J.—"No house, office, room, or other place, shall be opened, kept, or used for the purpose," &c. You say that those words do not extend to a tree in the park habitually resorted to for betting \*purposes?] [\*674 "Other place" in the statute means a place ejusdem generis with those enumerated: it must be a place of which some person may be the owner, and a place devoted to the purposes of betting. [ERLE, C. J.—What is a "public place," or a "place of public resort," has frequently been the subject of discussion, and also of some difference of opinion.(a) According to your argument, open-air transactions must go free. Here, it seems, the defendant does habitually in Hyde Park that which done in a room would render him liable to the penalty imposed by the statute. Is the place where this is done without the line of prohibition?] What is done here, is constantly done at Epsom without objection, and also at Tattersall's,

(a) See *Ex parte Brown*, 21 Law J., M. C. 113; *Ex parte Jones*, 21 Law J., M. C. 116; *Ex parte Davis*, 26 Law J., M. C. 178; *Davys, app.*, *Douglas, resp.*, 28 Law J., M. C. 193; *Sewell, app.*, *Taylor, resp.*, 7 C. B. N. S. 160 (R. C. L. R. vol. 97).

though, as to the latter place, it may be observed that it is a place *bonâ fide* established and used for another purpose. The preamble clearly shows to what this statute was intended to apply. If it had meant to declare all betting illegal, and the money deposited recoverable, the legislature would have so enacted in terms.

*Yeatman*, in support of his rule, was stopped by the court.

ERLE, C. J.—I am of opinion that this rule should be made absolute. The evidence was, that the defendant was in the habit of betting generally with the persons who chose to resort to the place which he used for the purpose of carrying on that business, viz. a tree in Hyde Park. I dwell upon the evidence of the plaintiff, that he had seen the defendant there daily making bets with a number of persons. The \*675] plaintiff \*there deposited with him the sum of 5*l.* 10*s.* upon an agreement to restore him 38*l.* 10*s.* upon the contingency of a certain horse named "Fly-trap" winning a certain race. Was that a deposit upon a contingency within the prohibition of the 16 & 17 Vict. c. 119? The 5th section of the statute enacts that "any money or valuable thing received by any such person aforesaid as a deposit on any bet, or as or for the consideration for any such assurance, undertaking, promise, or agreement as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing, or the value thereof, may be recovered accordingly, with full costs of suit, in any court of competent jurisdiction." The 1st section has, I think, words wide enough to embrace a case of this sort,—"*No house, office, room, or other place, shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, &c., or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid.*" This person used the tree in Hyde Park as a place for carrying on these illegal transactions; \*676] having there a betting-book, cards, and \*all the other accessories of his calling. I think he is clearly brought within the words of the act. The words "*other place*" following the words "*house, office, room,*" Mr. Salter has contended that "*place*" there must mean something in the nature of a structure of which there may be an owner or occupier. To hold those words to include a "*booth*" would hardly be thought too wide an extension of them. The mischief is to my mind precisely the same, whether the party stands under the shelter of an oak tree or of a roof or a covering of canvas: and I think the words are large enough to embrace it. Mr. Salter relies upon the preamble, which he says recites a mischief narrower than the construction which I place upon the enacting

words. Beyond all doubt, the mischief which the statute intended to remedy was that which was then known to exist, viz. the injury resulting to improvident persons by the opening of betting-houses or offices: but I think it was intended to go further, and to prohibit the trade of betting, wheresoever it might be carried on. If the prohibition had stopped at "houses, offices, and rooms," forsooth persons minded to carry on this traffic would resort to trees in the park, and the legislature may well have thought that a practice which should be placed under control, and for that purpose inserted the general words. Mr. Salter also contends that this construction will have the effect of bringing within the penalties of this act such bets upon horse-races as are in a measure recognised by the statute of 8 & 9 Vict. c. 108. But I think the mischief which the act was pointed at was the habit of using a particular place by persons skilled in gambling and betting, for the purpose of luring the ignorant and imprudent to the ruinous courses to which the vice of gambling too frequently leads. It was intended to present every possible obstacle to the professed \*gamester using a place for exercising his vocation, and for [677 this purpose to prohibit the keeping or using of any known place for the receipt of deposits on the contingency of a particular horse running and winning at a horse-race; and I can come to no other conclusion than that a particular spot used for that purpose in a public park is a "place" within the spirit and intention of the act of parliament.

KEATING, J.—I am of the same opinion, though at first I entertained some doubt whether the words of the statute were large enough to reach the case. I am now, however, satisfied that they are. The act was intended to prohibit the keeping or using of any house, room, or place for the deposit of moneys on the contingency of horse-races,—that is, to prevent the keeping or using of any known place of resort for such purpose. Mr. Salter admits that that which took place here would have been within the prohibition, if it had taken place in any house, office, or room, or even in a booth erected in Hyde Park. I think that the use of a tree in the park as a place of resort for the same purpose is equally within the mischief of the act. I agree with my Lord that our decision will not affect the question as to the legality of isolated transactions of betting, whether at Tattersall's, or in the park, or in a public street: and, if this had been a mere casual transaction of betting, Mr. Salter's argument might have been well founded. But the evidence is of an habitual and constant resort to the place in question for the express purpose of carrying on there the prohibited trade.

Rule absolute.



\*678]

\*HARRISON v. BLACKBURN. Nov. 21.

1. Entry is not necessary to the vesting of a term of years in the lessee: but for the purpose of maintaining an action of trespass, the lessee must enter, since that action is founded on the actual possession.

2. By a deed, reciting that A. was indebted to B. in the sum of £60*l*. for goods supplied, A. assigned to B. "all and every the household goods and furniture, stock in trade, and other household effects whatsoever, and all other goods, chattels and effects now being, or which shall hereafter be, in, upon, or about the messuage or dwelling-house and premises occupied by A., known as the Bull's Head, situate, &c., and all other the personal estate whatsoever of or to which the said A. is now and from time to time and at all times hereafter (so long as any money shall remain due to B.), and all the estate of A. in, to, or upon the premises hereby assigned or intended so to be," absolutely. Then followed a power to B. to sell and dispose of "the same premises," and out of the proceeds to pay the £60*l*. and expenses, and to render the surplus to A. :—

Held, that, notwithstanding the general words, the deed (which was registered under the Bills of Sale Act, 17 & 18 Vict. c. 36), did not pass to B. the term which A. had in the Bull's Head.

THIS was an action brought in the Common Pleas at Lancaster, to recover damages for breaking and entering a certain messuage, dwelling-houses, and premises of the plaintiff called The Bull's Head, situate in Bedford, in the southern division of the county of Lancaster, and there staying and continuing, making a great noise and disturbance therein, and then and there seizing, pulling, and tearing down and taking possession of divers trade and other fixtures of the plaintiff's affixed to the said premises, and then taking and carrying away and converting to his own use the said several fixtures of the plaintiff's, and also divers goods and chattels of the plaintiff's, and ejecting and expelling the plaintiff from the use and possession of the said dwelling-house and fixtures; and thereby the said premises and goodwill of and belonging to the plaintiff of the business of a public-house and inn there carried on became and were greatly deteriorated and depreciated in value, and the plaintiff was by reason of the premises otherwise greatly damaged and aggrieved.

The defendant pleaded,—first, not guilty,—secondly, that the dwelling-house and premises, trade, and other fixtures, goods, and chattels, goodwill and business in the declaration respectively mentioned, were not the plaintiff's as alleged,—thirdly, that the defendant did what was complained of by the plaintiff's leave. Issue thereon.

\*679] The cause came on to be tried before Williams, J., \*at the Liverpool Winter Assizes, 1863, when a verdict was found for the plaintiff for 500*l*. damages, subject to the opinion of this court upon the following case:—Prior to the month of July, 1863, John Battersby was tenant of the Bull's Head Inn, in the declaration mentioned. In the month of December, 1861, the said John Battersby was indebted to the plaintiff; and, on the 20th of the same month, Battersby executed a bill of sale to the plaintiff, which was duly filed on the 8d of January, 1862. The said John Battersby was tenant from year to year of the Bull's Head Inn, under the trustees of the will of the late Duke of Bridgewater, who were the owners of the Bull's Head Inn; his tenancy commencing in the month of November many years ago. On the 21st of July, 1863, the trustees distrained for two years' rent in arrear of the Bull's Head Inn, viz., for the sum of 54*l*. 1*l*s. 4*d*. On the 27th of July, 1863, a sale took place at the

Bull's Head Inn under the said distress, at which sale the whole of the movables, including furniture, stock-in-trade, and tenant's fixtures, were sold and disposed of. The goodwill, if any, was not put up for sale, and was not nor was it professed to be dealt with at the said sale. The sale did not realize sufficient to satisfy the arrears of rent and expenses. On the same day, viz. the 27th of July, 1863, Battersby signed the following memorandum, and gave up possession of the Bull's Head Inn and premises to his landlords, the said trustees of the late Duke of Bridgewater:—

"Bull's Head Inn, township of Bedford, in the county of Lancaster.

"I, James Battersby, occupier of the house known by the sign of the Bull's Head, in Bedford, and all premises, buildings, stabling, and bowling-green connected therewith, in my occupation as tenant to the trustees of the late Duke of Bridgewater. This \*agreement [\*680 made this day witnesseth that I do hereby give up peaceable possession of all the aforesaid house and premises this day into the hands of Mr. Richard Higgins, the agent of the aforesaid premises for the trustees of the late Duke of Bridgewater. As witness my hand, this 27th of July, 1863.

"JAMES BATTERSBY, his X mark.

"Witness. ELLEN BILLINGTON.

"Witnesses { WILLIAM WILSON.  
                  { RICHARD F."

On the same day, the 27th of July, 1863, the said trustees let the said Bull's Head Inn and premises, at a rent of 20*l.* per annum, to the defendant who entered into possession on the same day, and still remains in possession. His tenancy commenced on and from the 12th of May, 1863; but the payment of rent commenced from the 27th of July, 1863. The plaintiff by himself and by his agent has demanded of the defendant possession of the said Bull's Head Inn and premises, and has requested him to withdraw from the same; but the defendant has refused so to do. The goodwill of the said Bull's Head Inn and premises is of no value whatever.

The bill of sale is in the words and figures following:—

"This indenture, made the 20th of December, 1861, between James Battersby, of Bedford, in the county of Lancaster, innkeeper, of the one part, and John Harrison, of Horwich, in the said county of Lancaster, common brewer, of the other part: Whereas, the said James Battersby is now indebted to the said John Harrison in the sum of 60*l.* for ale supplied by the said John Harrison to the said James Battersby between the 1st of January, 1858, up to the date of these presents; and the said James Battersby has agreed to secure the repayment thereof in manner hereinafter mentioned: Now, this indenture witnesseth, that, in \*pursuance of the said agreement [\*681 in this behalf, and also in consideration of 5*s.* to the said James Battersby now paid by the said John Harrison, the receipt whereof is hereby acknowledged, he the said James Battersby doth by these presents grant, bargain, sell, and assign unto the said John Harrison, his executors, administrators, and assigns, all and every the household goods and furniture, stock-in-trade, and other household effects whatsoever, and all other goods, chattels, and effects now being

or which shall hereafter be in, upon, or about the messuage or dwelling-house and premises occupied by the said James Battersby, and known as The Bull's Head, situate in Bedford aforesaid; and all other the personal estate whatsoever of or to which the said James Battersby is now and from time to time and at all times hereafter (so long as any money shall remain due and payable to the said John Harrison, his executors, administrators, and assigns, by virtue of these presents); (a) and all the estate, right, title, interest, claim, and demand of the said James Battersby, of, in, to, or upon the said several premises hereby assigned, or intended so to be; Together with full power, and authority which the said James Battersby doth hereby give and grant unto the said John Harrison, his executors, administrators, and assigns, at the costs and charges of the said James Battersby, his executors or administrators, to use the name or names and act as the attorney or attorneys of the said James Battersby, his executors or administrators, in or about recovering, receiving, obtaining, and giving effectual receipts and discharges for the same; To have, hold, take, receive, and enjoy the said premises hereby assigned unto the said John Harrison, his executors, administrators, and assigns, absolutely: Provided, nevertheless, that, in case the said James Battersby, his heirs, executors, or administrators, shall, \*on demand made \*682] thereof in writing by the said John Harrison, his executors, administrators, or assigns, well and truly pay or cause to be paid unto the said John Harrison, his executors, administrators, or assigns, the said sum of 60*l.*, the said payment to be made without any deduction, then these presents shall be absolutely void, anything hereinbefore contained to the contrary notwithstanding: And the said James Battersby doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said John Harrison, his executors, administrators, and assigns, that he the said James Battersby, his heirs, executors, or administrators, shall and will on demand made thereof as aforesaid pay or cause to be paid unto the said John Harrison, his executors, administrators, or assigns, the said sum of 60*l.* in manner aforesaid, without any deduction, and without fraud or further delay: But it is hereby expressly declared and agreed, that, after default shall be made by the said James Battersby, his executors, administrators, or assigns, in payment of the said sum of 60*l.*, contrary to the tenor and effect of the before-mentioned proviso, then and in such case it shall be lawful for the said John Harrison, his executors, administrators, or assigns, to sell and dispose of the same premises, and every or any part thereof, for such price or prices as can be reasonably had or gotten for the same, and to receive and take the moneys to arise from such sale or sales thereof, and to stand possessed of such moneys upon the trusts following, that is to say, upon trust in the first place to retain, satisfy, and discharge all costs, charges, and expenses incidental to these presents, and in the next place to satisfy, pay, deduct, or retain unto the said John Harrison, his executors, administrators, or assigns, the said principal sum of 60*l.*; and, from \*683] and after full payment and satisfaction of such costs, charges, and \*expenses, and principal sum of 60*l.*, to render to and account for the surplus (if any) of the money arising from such sale

or sales aforesaid to the said James Battersby, his executors, administrators, or assigns: And it is hereby lastly declared and agreed by and between both the said parties to these presents, that the receipt or receipts of the said John Harrison for any money payable to him under these presents shall be a good and sufficient receipt and discharge to any purchaser or purchasers. In witness, &c.

his mark  
"JAMES BATTERSBY" X  
and seal.

"JOHN HARRISON."

The question for the opinion of the court was, whether, upon the true construction of the said bill of sale, and on the state of facts above appearing, any right or interest in the Bull's Head Inn and premises, and the good-will thereof, passed to the plaintiff, sufficient to sustain the declaration against the defendant.

In case the court should be of opinion that a right or interest sufficient to sustain the declaration passed to the plaintiff, the damages sustained by the plaintiff in respect of the matters in the declaration mentioned were assessed at one farthing.

*Edward James, Q. C.* (with whom was *Baylis*), for the plaintiff.—The question is whether any interest in the Bull's Head Inn passed to the plaintiff by the bill of sale of the 20th of December, 1861. It professes to be a conveyance by Battersby of all he had, including the term he had in the public-house. It clearly operated to vest the term in Harrison. *Ringer v. Cann*, 8 M. & W. 343, is precisely in point. There Vince, the lessee of a mill and premises at a rack-rent, being in insolvent circumstances, executed an \*assignment, whereby, after reciting his insolvency, and that he had agreed to assign "all his debts, personal estate, and effects of every description, to C. and B., in trust for the benefit of his creditors," he conveyed and assigned to the said C. and B. all and singular the stock-in-trade, implements, and utensils in trade, corn, grain, hay, horses, carts, and carriages, *crops of every kind, as well severed as not*, and personal estate whatsoever, of him Vince, in, upon, or about the said mill and premises now in his use or occupation, or elsewhere, &c. (except the wearing apparel of himself and family); and also all debts, securities, writings, &c., and all other the personal estate and effects of him the said Vince, whatsoever or wheresoever, or in or to which he is in anywise interested or entitled; habendum, in trust out of the proceeds, first, to pay the costs of the assignment, &c., secondly, to pay the rent due and in arrear for the said mill and premises, or accruing due until and at and up to the 6th of April then next, and thirdly, to distribute the residue for the benefit of his creditors: and it was held that the words of the assignment were large enough to comprehend the lease of the mill, and, the jury having found that the assignees had accepted the lease, that it passed to them under the assignment. The only difference between that case and the present, is, that there there was a recital in the deed that Vince was the lessee of the premises; but the object of both was the same. It was there contended that the words, though general, were not sufficient to pass the lease; and *Payler v. Homersham*, 4 M. & Selw. 423, *Doe d. Meyrick*, 2 Cr. & J. 223, *Roberts v. Kuffin*, 2 Atk. 112, and *Rawlings v.*

Jennings, 18 Ves. 39, were cited. But Lord Abinger, C. B., said: "I think the distinction in all these cases, is, whether the object of the parties was to pass a limited interest or not: if it was, then the rule \*685] is that we are not to \*construe general words so as to enlarge that limited interest. I believe in every case that has been mentioned the object was to pass a particular estate; but such is not the object here. The object of the conveying party here was, to make a general assignment of his property over to trustees, in order to pay his creditors. Can it be doubted, if this lease was of any value, that the object was to pass the whole? And here are words which are large enough to pass everything. We must suppose the object the parties had in view was, to pass everything of value, capable of being turned to account in the hands of the assignees; and I cannot see why the words, which are sufficiently comprehensive to include everything he had, should not be held to pass the leasehold estate." [ERLE, C. J.—The assignment there was for the benefit of all the creditors: here, it was to secure a debt of 60*l.* to a single creditor. BYLES, J.—Suppose the rent of the premises had been double the annual value, would you say that the term passed?] Whether valuable or burthensome, can make no difference.

*Manisty, Q. C., contrà.*—The plaintiff had no estate or interest in the Bull's Head Inn sufficient to enable him to maintain this action, regard being had to the state of facts found by the case. One test is, could the Duke's trustees have sued him for the rent if he had taken possession under the deed in question? In July, 1863, the trustees, having distrained for two years' rent, sold all Battersby's property, and took from him a surrender of the premises, and immediately let them to the defendant, and gave him possession. The question is, whether, upon this state of facts, the plaintiff had such a possession as to entitle him to sue in trespass. The authorities clearly negative that \*686] proposition. Actual entry is necessary: a mere \*demand of possession is not enough. [ERLE, C. J.—If the term is vested in him, the plaintiff in law is in: see *Cooper v. Willomatt*, 1 C. B. 672 (E. C. L. R. vol. 50).] In *Turner v. Cameron's Coalbrook Steam Coal Company*, 5 Exch. 932, it was held that trespass will not lie against the occupier of land, at the suit of the mortgagee, who has never been in actual possession or been seised of the land, and has not obtained a judgment in ejectment, either by default or by verdict; and therefore he cannot in such case waive the tort, and maintain an action of use and occupation. Parke, B., in delivering judgment, said: "We are all clearly of opinion that the plaintiff was not in a condition to bring an action of trespass, inasmuch as he was mortgagee out of possession; he never had entered upon the property at the time of the trespass committed, and never was in actual possession. He could only have maintained one in case he had brought an ejectment and laid the demise at an antecedent period, and the defendants had either suffered judgment by default as tenants in possession, or there had been a verdict at the trial, and then the defendants would have been in the condition of admitting the lease, and therefore the plaintiff would have been in possession, by the fiction in ejectment, from the time of the demise." So, in *Litchfield v. Ready*, 5 Exch. 939, it was held that a mortgagee out of possession, who gives notice of the mort-

gage to the tenant who has occupied since the mortgage, cannot maintain trespass for mesne profits against the tenant for the rents accrued due since the date of the mortgage, by mere entry upon the land after the notice. "If," said Parke, B., "the plaintiff seeks to recover mesne profits antecedently to the day of the demise in the declaration in ejectment, he must go further, and is bound to prove such a title, *accompanied by possession*, as would enable him to maintain \*an ordinary action of trespass." [ERLE, C. J., referred to *Williams v. Bosanquet*, 1 Brod. & B. 238 (E. L. C. R. vol. 5), [\*687 3 J. B. Moore 500, where it was held, that, when a party takes an assignment of a lease by way of mortgage, as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for payment of rent, though he has never occupied or become possessed in fact.] That was to make him liable to the covenants. Patteson, J., in delivering the judgment of the court in *Ryan v. Clark*, 14 Q. B. 65 (E. C. L. R. vol. 68), says: "It is distinctly laid down in *Williams v. Bosanquet*, that entry is not necessary to the vesting of a term of years in the lessee; the interest and the legal right of possession, where the term is to commence immediately, and not in future, vests in the lessee before entry; and, of course, the right of possession in the lessor is gone, though, for the purpose of maintaining an action of trespass, the lessee must enter, since that action is founded on the actual possession." (a) The result of the authorities is thus summed up in *Roscoe on Evidence*, 10th edit. 608,—To entitle a party to maintain an action for a trespass to land, "It must appear that the plaintiff was in the actual and immediate possession of the locus in quo where the trespass was committed. Therefore, an heir before entry, who has only \*a seisin in law, cannot maintain trespass: *Com. Dig. Trespass* (B. 3). Nor a bargainee before [\*688 entry. *Ib.*; *Barker v. Keat*, 2 Mod. 251; *Geary v. Bearcroft*, *Carter* 66. Therefore, a mortgagee by demise for years cannot bring trespass against a stranger, before entry: *Wheeler v. Montefiore*, 2 Q. B. 133 (E. C. L. R. vol. 42); *Turner v. Cameron's Coalbrook Steam Coal Company*, 5 Exch. 932: nor a parson before induction,—*Hare v. Bickley*, *Plowd.* 526." Further, it is submitted that the deed of the 20th of December, 1862, did not assign the term. There is nothing upon the face of the instrument to show an intention to convey more than the chattels. It was registered as a bill of sale under the 17 & 18 Vict. c. 36. And nothing can be more loose than the general words. In the case relied on of *Ringer v. Cann*, 3 M. & W. 343, the deed was super visum a conveyance of all the property.

*James*, in reply.—In *Ringer v. Cann*, 3 M. & W. 343, there was a trust for sale, and a power to pay the rent. Here, there is no provision as to the rent; for, as the term was intended to pass, the assignee would necessarily become liable for rent, and therefore there was no

(a) And see per Lord Denman in *Doe d. Parsley v. Day*, 2 Q. B. 147, 156 (E. C. L. R. vol. 42), 2 Gale & D. 757, *Wheeler v. Montefiore*, 2 Q. B. 133, 1 Gale & D. 493: and see *Blatchford, app., Cole, resp.*, 5 C. B. N. S. 514 (E. C. L. R. vol. 94), where it was held that the remedy for double value given by the 4 G. 2, c. 28, s. 1, against a tenant unlawfully holding over after the determination of the term, and after demand and notice in writing, is given only to the lessor or landlord or the person entitled to the reversion, and not to one to whom the landlord has granted a fresh lease, to commence from the expiration of the former term,—such new lessee having no estate, but a mere interesse termini.

occasion to make a special provision for it. The mortgagor may maintain an action of ejectment against the mortgagee: and he has an equal right as against a stranger. If he may maintain ejectment, why not trespass? In the passage cited from Roscoe, p. 609, it is said that a mortgagee by demise for years cannot bring trespass against a *stranger* before entry. But this defendant is no stranger. He comes in under Battersby. The landlord came in under the surrender made by Battersby in July, 1863. He could have no better title than Battersby had: neither could his tenant, the now defendant. If a demand and refusal be sufficient to maintain trover for a lease, \*689] why should \*not a demand and refusal be sufficient to maintain trespass in respect of the chattel interest? The only question intended to be raised here was, whether, upon the construction of the bill of sale, and the facts found, any right or interest in the premises, that is, the Bull's Head Inn, passed to the plaintiff. It never was intended to raise the question whether actual bodily possession was necessary to entitle the plaintiff to maintain trespass.

ERLE, J. C.—I am of opinion that the verdict ought to be entered for the defendant. This is an action of trespass for breaking and entering certain premises known as the Bull's Head Inn, Bedford, the interest in which the plaintiff claimed to have been assigned to him by one Battersby in December, 1861: and the question is whether or not the term was conveyed by the deed of that date. By that deed, after reciting that he was indebted to the now plaintiff, Harrison, in the sum of 60*l.* for ale supplied, Battersby assigns to Harrison, his executors, &c., "all and every the household goods and furniture, stock-in-trade, and other household effects whatsoever, and all other goods, chattels, and effects now being or which shall hereafter be in, upon, or about the messuage or dwelling-house and premises occupied by the said James Battersby, and known as the Bull's Head, situate in Bedford aforesaid." Having thus assigned to the plaintiff all his household goods, chattels, and effects in and about the messuage occupied by him, the assignor goes on to assign "*all other the personal estate whatsoever of or to which the said James Battersby is now and from time to time and at all times hereafter (so long as any money shall remain due and payable to the said John Harrison, his executors, &c., by virtue of these presents); and all the estate, right, title, interest, claim, \*and demand of the said James Battersby of, in, \*690] to, or upon the said several premises hereby assigned or intended so to be,*" absolutely. The deed then gave a power to Harrison "to sell and dispose of the same premises and every or any part thereof," and out of the proceeds to pay the 60*l.* and expenses, rendering the surplus (if any) to Battersby. I think the context leads irresistibly to the conclusion that the parties to this deed merely contemplated the assignment of the chattels personal, and did not contemplate passing the chattel real, the lease of the premises. General words following specific words are ordinarily construed as limited to things ejusdem generis with those before enumerated.(a) Here the two first classes of things assigned are confined to chattels strictly so called. It seems to me to be very unlikely that a creditor who was taking an assignment of chattels as a security for a debt of 60*l.* would burthen

(a) See *Doggett v. Catterns*, ante, p. 669.

himself with a lease which would impose upon him a liability for an uncertain amount of rent. If he had intended to take to the term, I think we should have found words in the deed more expressly and clearly intimating such intention. The instrument provides that the plaintiff is to continue in possession until his debt of 60*l.* is satisfied, and that, in case of default, he is to be at liberty to sell the premises, that is, the things assigned, in trust to retain the expenses and his debt, and to return the surplus, if any, to Battersby. Not a word is said about paying the rent or any arrears of rent, which would have been provided for if it had been intended that the plaintiff should become assignee of the term. The case of *Ringer v. Cann*, 3 M. & W. 348, is in terms very much like this case: but there are two very important distinctions between them. There, the assignment was for the benefit of all the creditors of the \*assignor, and would therefore naturally be an assignment of all the debtor pos- [\*691  
sessed: and, further, it was there provided that the rent should be paid out of the proceeds of the sale. Upon the best construction, therefore, that I can put upon this instrument, I think the term was not intended to pass. I also am of opinion with Mr. Manisty,—assuming that the term did pass by this deed,—that the assignee of a term cannot maintain trespass in respect of the premises unless he has actually entered into possession of them. This is clear from the elaborate judgment of Patteson, J., in *Ryan v. Clarke*, 14 Q. B. 73 (E. C. L. R. vol. 68). It is there laid down, and to the same effect are all the text-books, that, to entitle a party to maintain trespass, actual entry is necessary. To render him liable upon the covenants, an assignment in law is sufficient: but to maintain trespass, there must have been an actual entry.

BYLES, J.—I am of the same opinion upon both points. Nobody doubts that a gift of all a man's "personal estate" would include a term for years. But, as a general rule, all written documents are to be construed according to the intention of the parties as it is to be collected from the language which they have used. In *Payler v. Homersham*, 4 M. & Selw. 423, a deed of release containing very general words releasing the debtor from all claims and demands which the several creditors had against him, or thereafter could, should, or might have, was held to be confined in its operation to the respective debts referred to in the recital. So, in *Rawlings v. Jennings*, 13 Ves. 39, where the testator gave to his wife certain Bank stock, together with all his "household furniture and effects, of what nature or kind soever," that he might be possessed of at the time of his decease, and then \*bequeathed certain stock and money legacies to other [\*692  
persons, Sir W. Grant, M. R., held that the bequest to the wife was confined to articles of the nature of those specified, and did not comprise the general residue.(a) There, the court restrained the ope-

(a) Observing that, part of the property being given to her afterwards, the word "effects" must receive a more limited construction. Mr. Jarman (1 Jarman on Wills, 2d edit. 645, n. g.), remarking upon this case, says,—“But, according to the statement of the will in the report, the only other bequest to the wife is of the Bank stock, which is anterior. See *Parker v. Marchant*, 1 Y. & C., C. C. 304, where Vice-Chancellor Knight Bruce observed upon this case, that perhaps the word ‘household’ belonged to the word ‘effects,’ as much as to the word ‘furniture.’”

And see *Campbell v. Prescott*, 15 Ves. 503, where a testator gave to his sons A. and J. all his



ration of the word "effects" by preceding words, and held it to mean things ejusdem generis. The only difficulty I have felt has arisen from the case of *Ringer v. Cann*, 8 M. & W. 348; but my Lord has effectually distinguished it. Here, too, the instrument contains qualifying words, though imperfectly expressed, which show plainly enough what the parties intended should pass thereby. In *Ringer v. Cann*, Parke, B., lays great stress on the application of the proceeds of the sale. "With respect," he says, "to the clause as to payment of the rent, it is not confined to the future, but applies to the by-gone rent as well, in respect of the mill and premises; not only to that which had become due, but to that also which was on the eve of becoming due on the 6th of April following; and the provision \*693] enables the trustees to pay it, whether they take possession of the property or not. The other words used do not appear to me to be sufficient to control these general words." If it had been intended here to pass the term, the first thing the assignee would do would be to pay the rent. But there is an express stipulation that he shall apply the proceeds otherwise. I may advert to another distinction between that case and the present. In *Ringer v. Cann*, there was an assignment of growing crops, and no distinct provision that I can see relative to the taking of them: and this makes it the more reasonable that the term should be assigned. Looking, therefore, at that case carefully, it seems to me to be rather an authority against than for the plaintiff. As to the other point, I at first overlooked the distinction between ejectment and trespass. But my Brother Keating pointed out the distinction: in ejectment, the want of actual possession was supplied, under the old course of proceeding, by the rule to confess lease, entry, and ouster. For these reasons, I am of opinion that the defendant is entitled to judgment,—a conclusion which is equally in conformity with the justice as with the law of the case.

KEATING, J.—As I did not hear the whole of the argument, I will only say, that, so far as I have heard, I entirely concur with the rest of the court upon both points. Judgment for the defendant.

sugar-house, cupola, and merchandise stocks, with jewels, plate, household goods, furniture, and *all effects whatsoever*, and appointed them executors: Sir W. Grant, M. R., held that the whole personalty passed under this clause, remarking that there was no case for the restrictive sense attempted to be put upon the words "all my effects whatsoever."

\*694] **\*JOSHUA WILSON and Others, Appellants; THE CHURCHWARDENS OF THE PARISH OF SUNDERLAND NEAR THE SEA, Respondents. Nov. 9.**

By a local act (of 1719) creating the township of Sunderland a distinct parish, twenty-four "substantial and creditable inhabitants" of the parish were to be elected vestrymen; and it was enacted that the rector and thirteen or more of the vestrymen in vestry assembled, or the major part of them, might make a rate for, amongst other things, keeping the church in repair,—with a power to four or more justices, in case of default in payment of the rate, to grant and issue their warrant to levy the same by distress and sale of the offender's goods: and a power of appeal to the sessions was given to any person who should find himself aggrieved by any assessment, or by any distress to be made for the same, within three months after such distress made:—

Held, that the justices had no jurisdiction to inquire into the validity of the rate, the remedy, if it were invalid, being by appeal to the sessions; and that, if they had such juris-

diction, the fact of some of the vestrymen not *residing* and *sleeping* within the parish did not disqualify them.

THIS was a case stated by justices of the peace in and for the county of Durham, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before them as hereinafter stated.

At a petty sessions holden at Sunderland, in the county of Durham, on the 28th of May, 1864, an application was made to the justices by the churchwardens of the parish of Sunderland near the Sea, hereinafter called "the respondents," to grant and issue out their warrant to cause to be levied by distress and sale of the goods of Joshua Wilson, Henry Wilson, Caleb Wilson, and Charles Wilson, hereinafter called "the appellants," the sum of 7*l.* 0*s.* 7½*d.*, being the amount of a rate assessed upon them the appellants on the 9th of July, 1863, by the rector and thirteen of the vestrymen of the parish of Sunderland near the Sea, in vestry assembled, at a meeting duly convened pursuant to, and acting under and by virtue of the powers, authorities, and provisions of, an act of parliament passed in the fifth year of George the 1st (18th April, 1719), intituled "An Act for making the town and township of Sunderland a distinct parish from the parish of bishopwearmouth, in the county of Durham."

The appellants having been duly summoned, the \*appli- [\*695  
cation was heard, the said parties respectively being then pre-  
sent; and the justices determined to issue their warrant to levy the  
said sum of 7*l.* 0*s.* 7½*d.*

The appellants being dissatisfied with this determination, as being erroneous in point of law, duly applied to the justices, in writing, to state and sign a case setting forth the facts and the grounds of such their determination, for the opinion of this court. The justices thereupon stated the following facts:—

Upon the hearing of the application, the rate or assessment was produced and proved before the justices. It was intituled and signed, and, as far as concerns the said appellants, is as follows:—"An assessment upon the yearly value of all houses, lands, tenements, hereditaments, and estates whatever, and upon the value of stock-in-trade and personal estates, within the parish of Sunderland near the Sea, in the county of Durham, for keeping in repair the church of the said parish, defraying the yearly expenses of the churchwardens respecting the same, for paying the rector his stipend, the parish clerk's salary, and for other the purposes mentioned in the act of parliament passed in or about the year 1719, intituled," &c.

"Made and assessed this ninth day of July, 1863, being a rate of 3*d.* in the pound under and by virtue of the powers of the said act or any other power or authority enabling in this behalf.

(Signed) "H. PETERS, rector, chairman.

"THO. REED.

"MATTHEW FORSTER.

"JNO. POTTS.

"GEORGE REED.

"JOSEPH HUMPHREY.

"R. B. PORRETT.

"THOS. DIXON.

"WILLIAM THOMPSON, jun.

"J. G. HILL.

"MARK DOUGLAS.

"THOS. RISEBOROUGH.

"JOHN FERGUSON.

"WM. ST. JOHN."

\*696] [Then followed, in columns, the numbers, the names \*of the occupiers and owners, the description of the property rated, the name or situation of the property, the rateable value, and the amount of the rate to be paid.]

At the foot of the rate were these words:—"At a meeting of the undersigned, the rector and gentlemen of the ancient vestry for the parish of Sunderland near the Sea, in the county of Durham, held this day, legal notice being first given, it was resolved that the foregoing assessment be collected for the year commencing at the visitation, of the several inhabitants and persons therein named, the same being an equal rate or assessment to the best of our judgment. Given under our hands this 9th of July, 1863." [Signed as before.]

Then follows the following memorandum of allowance of the said rate:—"Durham, to wit. We, the undersigned, being four of Her Majesty's justices of the peace in and for the county of Durham (and of the quorum) do so far as we can and lawfully may, make, consent unto, and allow the foregoing rate or assessment. Dated this 18th of July, 1863." [Signed by the four justices.]

It was also proved before the justices that the appellants are Quakers; that they were the occupiers of the houses, warehouses, and hereditaments in the said parish mentioned in the said rate and set opposite their names therein, where they carried on their trade and business, and were possessed of the stock-in-trade therein.

It was also proved that the parties making and signing the said rate were the rector and thirteen of the twenty-four vestrymen, and were members of the vestry chosen and acting under the local act, and were the whole of the members of such vestry present at a meeting duly convened; that the rate had been demanded of the appellants; and that they had made default in payment thereof.

\*697] \*It was also proved, on the cross-examination of the collector, that, at the time of their election, and thenceforth up to the making of the said rate, nine out of the thirteen vestrymen who signed the rate, although rate-payers occupying houses and shops in the parish, and carrying on their trades and businesses there, resided and slept in their private dwelling-houses in the adjoining township of Bishopwearmouth.

It also appeared by the rate that stock-in trade was rated therein, but that ships (many of the persons assessed being shipowners) were not expressed as rated therein; and also that the occupiers of 886 properties occupied in small tenements under the yearly value of 6*l.* each, and for which the landlords thereof, under the Small Tenements Act, 13 & 14 Vict. c. 99, were rated to the poor-rate of the parish instead of the occupiers thereof, were not included in the rate produced before the justices, nor were the landlords or occupiers thereof assessed for the same therein: and, as to these, it was proved by the collector of the said rate that the occupiers of these tenements were many of them paupers receiving parish relief, and that very few if any of them in his opinion were able to pay the said rate, and that it had not been customary to include the said tenements in the said rate.

The parish of Sunderland is one of the parishes comprised within the boundaries of the borough of Sunderland, the mayor, aldermen,

and burgesses of which form the local board of health: and it was admitted, that, since the passing of the Municipal Corporation Act, 5 & 6 W. 4, c. 76, no scavenger had been appointed for the said parish of Sunderland under the local act of 1719.

On the case being called on, and previous to any evidence being taken, it was alleged by the professional adviser of the appellants that they disputed the validity of the rate.

\*It was contended on behalf of the appellants, that the said Sunderland Local Act, 1719, had, so far as it applied to the [\*698 recovery of the rate, been repealed by the 5 & 6 W. 4, c. 74; and that the justices had therefore no power to issue their warrant of distress.

It was also contended on the part of the appellants, that the rate was invalid, because nine of the thirteen persons who had made and signed the same were not properly elected vestrymen under the local act of 1719, inasmuch as they were not nor was any of them resident and sleeping within the said parish.

It was also contended on behalf of the appellants, that the rate was invalid, because of the omission of the said small tenements therefrom, and by reason that "ships," as forming stock-in-trade, were not included in the said rate under the designation "ships."

It was contended on the part of the respondents,—first, that the Sunderland Local Act, 1719, was not repealed by the 5 & 6 W. 4, c. 74, as alleged by the appellants,—secondly, that the justices had no jurisdiction, on this application, to inquire into or decide on the legal constitution of the vestry or the qualification of the vestrymen, nor on the validity of the rate,—thirdly, that, if even the justices had jurisdiction to decide on the legal constitution of the vestry or the qualification of the vestrymen, that, by the Sunderland Local Act of 1719, it was not required that the vestrymen should be *resident* and *sleep* within the parish, but only that they should be *inhabitants* of the said parish, occupying rateable hereditaments therein, and paying rates; and that therefore the said nine persons so acting as vestrymen were duly qualified to act as such,—fourthly, that, if even the justices had jurisdiction to inquire into and decide on the validity of the rate, the objections of the appellants were untenable and not sufficient to justify them in refusing to grant their warrant.

\*The justices, being of opinion that their jurisdiction was [\*699 not ousted by the appellants disputing the validity of the rate, and that the Sunderland Local Act of 1719, and the powers therein authorizing them to issue their warrant of distress, were not repealed or affected by the 5 & 6 W. 4, c. 74, but were and are still in force,—that they had no jurisdiction to inquire into or to decide on the constitution of the vestry or the qualification of the members thereof nor into the validity of the rate,—and that the objections made by the appellants to the rate were not sufficient to justify them in refusing to grant their warrant,—gave their determination against the appellants, and signed their warrant, but suspended the issuing and levying thereof on the goods of the appellants until the opinion of the court should be obtained.

The questions of law for the opinion of the court, were,—first, whether, the appellants having stated that they disputed the validity

of the rate, the jurisdiction of the justices to hear the case and grant their warrant was or was not ousted,—secondly, whether the Sunderland Local Act of 1719, or the power thereby given to the justices to issue their warrant for levying the rate, had been repealed by the 5 & 6 W. 4, c. 74,—thirdly, if not, whether the justices, on the hearing of the application for the said warrant, were bound to inquire into, and had jurisdiction to decide on, the legality of the constitution of the vestry or the qualifications of the members of such vestry,—fourthly, if they had such jurisdiction, whether it was required by the said Sunderland Local Act that the vestrymen chosen thereunder should be inhabitants *residing* and *sleeping* in the said parish.

And the court was solicited to remit the case to the justices with their opinion thereon, or to make such other order as the court might deem fit.

\*A. *Wills*, for the appellants.—The first question is, whether  
 \*700] the justices have jurisdiction at all in the case of Quakers, where the validity of the rate is disputed; the second, whether they were bound to go into any matter affecting the validity of the rate; and the third, whether, assuming that the justices had jurisdiction, they were entitled to issue their warrant. By the local act of 1719, s. 5, it was enacted, that, within three months next after the 1st of May, 1719, the rector or minister of the church of Sunderland for the time being, on some Sunday, in the forenoon, immediately after Divine Service, should in the said church give public notice to the said parishioners to meet in the vestry-room there at a day and hour which he should then name for that purpose, to choose vestrymen; and that the major part of the inhabitants paying scot and lot then and there to be assembled pursuant to such notice should choose twenty-four substantial and creditable *inhabitants* of the said parish of Sunderland, each of which should have a freehold estate or other estate of inheritance of the yearly value of 10*l.*, to be vestrymen for the parish for the space of three years from the day of such election: and provision was made for successive elections. By s. 9, the rector and *thirteen* of the vestrymen in vestry assembled, or the major part of them, were empowered, amongst other things, to appoint a scavenger for the town, and also  
 “from time to time equally to rate, tax, and assess all tenants, occupiers, and farmers of all houses, keys, lands, tenements, and hereditaments, and estates whatsoever in the said parish of Sunderland, and also stock-in-trade and personal estates, with such sum or sums of money as they or the major part of them then and there assembled shall think just and reasonable (having a due regard to the yearly rents or  
 \*701] values of such houses, keys, lands, tenements \*or hereditaments, and other estates, and to the true value of such stock-in-trade and personal estates) for defraying the charges and expenses of procuring and obtaining the act, and for and towards buying of bells for the church, and for the doing, finishing, and perfecting what should be thought fit and convenient to be further done in or about the said new church, and for keeping the same in repair, defraying the yearly expenses of the churchwardens concerning the same,” and for raising a yearly stipend for the rector, and for the salary of the clerk and scavenger. By s. 17 it was enacted, that, in case default should be made in payment of the sums so to be taxed or assessed,

by the persons upon whom the same should be so rated and taxed, it should be lawful for any four or more justices of the peace within the county of Durham, and they were thereby authorized and empowered, to grant and issue out their warrant or warrants under their hands and seals, for the intent and purpose to cause the same to be levied by distress and sale of the offender's goods wheresoever the same should be found." By s. 18 it was enacted, that, "if any person should find himself or herself aggrieved by any assessments to be made by virtue of the act, or *by any distress or seizure to be made for the same*, or for the money so to be collected, in such case he or she might appeal to the justices of the peace to be assembled at any general quarter sessions of the peace to be held for the said county of Durham, *within three months after such distress made*, who were thereby empowered to hear and finally determine the same, and to award and give costs to the party and parties appealing or defending, as to them should seem meet; and the determination of the said justices should be final, and no appeal to be had or made from the same."

Where an appeal to the sessions is given, generally \*speak- ing that is the only remedy,—The Queen v. The Justices of [\*702 Kingston, Ellis, B. & E. 256 (E. C. L. R. vol. 96); Ex parte May, 2 Best & Smith 426 (E. C. L. R. vol. 110). But, here, the appeal given by the 18th section of the local act, is perfectly illusory,—after a distress has been made. [BYLES, J.—Not so. The appeal may be before as well as after distress: the only limit is three months.] Then, by the 5 & 6 W. 4, c. 74, it is provided that "no suit or other proceeding shall be had or instituted for or in respect of any great or small tithes, &c., rates, or other ecclesiastical dues or demands whatsoever of or under the value of 50*l.*, withheld by any Quaker; but that all complaints touching the same shall be heard and determined only under the powers and provisions contained in the recited acts," —7 & 8 W. 3, c. 6, and 53 G. 3, c. 127. This is principally a rate for ecclesiastical purposes. [ERLE, C. J.—This is purely a temporal demand.] The rate was clearly bad: and the justices had jurisdiction to inquire into its validity. To make a rate valid, there must be a majority of the number named in the appointment of vestrymen present: *Blacket v. Blizard*, 9 B. & C. 851 (E. C. L. R. vol. 17). Here, nine of the thirteen persons who signed the rate were not qualified to act as vestrymen, not residing within the parish: and there was no other way of trying the validity of their appointment than by objecting to the rate. To entitle a party to act as a vestryman under the local act, it is not enough that he is a rated parishioner: he must also be an "inhabitant." In Stephens's Laws of the Clergy, Vol. 2, p. 1327, outdwellers are contrasted with inhabitants; and so in 1 Burn's Ecclesiastical Law, 415 *l.* In Sturges Bourne's Act, 58 G. 3, c. 69, the word "inhabitant" is used throughout to denote those who were entitled to vote in vestry; and it was thought necessary to amend that in the next session (59 G. 3, c. 85, s. 1), to make it include persons not *resident* within \*the parish. The word has received [\*703 a similarly restricted interpretation under the Reform Act, 2 W. 4, c. 45.(a)

(a) Section 27. See *Withorn, app., Thomas, resp.*, 8 Scott N. R. 783, 7 M. & G. 1 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 125.

*Lush*, Q. C. (with whom was *Prideaux*), contra.—The only questions which remain to be considered, are,—first, whether the magistrates were bound to inquire into the validity of the rate,—secondly, if so, whether the persons who made this rate were duly qualified to act as vestrymen. The jurisdiction given to the magistrates by the local act is purely ministerial; and a right of appeal is given to the quarter sessions; not, as is suggested, a right to appeal after distress, but a right unlimited as to time where there has been no distress, and limited to three months where there has been a distress. It is enough that the rate is made by persons acting as vestrymen de facto. Then, as to the meaning of the word “inhabitant.” To determine that, regard must be had to the object of the statute. The occupier of a house in the parish is bound to serve the office of churchwarden, although not residing there.<sup>(a)</sup> In the Statute of Bridges, 22 H. 8, c. 5, “inhabitants” are held to include all holding lands in the county whether resident there or not. In *The King v. Barwick*, 7 T. R. 33, where several persons held in partnership, some of whom actually resided on and occupied the property and others resided at a distance, in another parish, the latter as well as the former were held to be bound to take parish apprentices, if in other respects fit persons to take them. Lord Kenyon there said: “It has been taken for granted in the argument of this case that the appellant is not an inhabitant: \*704] but the contrary is most clear, according to the \*construction put on the statute 22 H. 8, c. 5, which makes the ‘inhabitants’ of counties liable to the repair of bridges. Lord Coke (2 Inst. 702) in his comment on that statute says that persons having lands in their own possession, though dwelling in a foreign county, are inhabitants; and that doctrine has never been doubted from that time to the present.” So, in *The King v. Hall*, 1 B. & C. 123, 186 (E. C. L. R. vol. 8), 2 D. & R. 241, Abbott, C. J., says: “The meaning of particular words in an act of parliament, as well as other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained. The meaning of the word ‘inhabitants,’ in the Statute of Bridges, which was referred to at the Bar, affords an illustration of this proposition very applicable to the present case. The inhabitants of any county, city, or other place, taking that word either in its strict or in its popular sense, are those persons only who have their dwelling therein; and all persons who have their dwelling therein are inhabitants thereof. But the object of the statute being to raise a fund for the repair of bridges by the taxation of persons to a reasonable aid and sum of money for that purpose, and to enforce the payment of the tax, in case of refusal, by distress on the lands, goods, and chattels of the persons taxed, the word ‘inhabitant’ has been held, on the one hand, to include all the occupiers of lands in the county, &c., although actually living and dwelling not in that county, but in some other, and, on the other hand, not to include servants, lodgers, or inmates, although actually dwelling and abiding in the county.” The word “inhabitants” is used in the same general sense in the 43 Eliz. c. 2.

(a) *The King v. Poynder*, 1 B. & C. 178 (E. C. L. R. vol. 8), 2 D. & R. 258.

It is plain, therefore, that these vestrymen were \**"inhabitants"* within the meaning of the local act of 1719.(a) [\*705]

*Wills* was heard in reply.

ERLE, C. J.—I am of opinion that our judgment in this case ought to be for the respondents. Our opinion is requested by the justices, as to whether under the circumstances stated they had jurisdiction to hear the case and grant their warrant,—whether, on the hearing, they had jurisdiction to decide on the legality of the constitution of the vestry or the qualifications of the members thereof,—and, if so, whether it was required by the Sunderland local act that the vestrymen chosen thereunder should be inhabitants *residing* and *sleeping* in the said parish. The appellants disputed the jurisdiction of the justices under the local act to enforce the rate in question, because, they (the appellants) being Quakers, the jurisdiction of the justices over them in respect of church-rates was taken away by the statute 5 & 6 W. 4, c. 74. It has already been pointed out that that general law has no application to the present case. If this had been the ordinary case of a church-rate, the rate being objected to, the parties seeking to enforce it would be remitted to the Ecclesiastical Court. But here the rate originates in the local act, and is altogether of a temporal character; and in respect of any objection thereto an appeal is by the act given to the justices in quarter sessions, and that right of appeal still continues. The justices being asked to enforce the rate by warrant, it was objected on the part of the appellants that the [\*706] \*local act, so far as it applied to the recovery of the rate, was repealed by the 5 & 6 W. 4, c. 74. That objection is disposed of. It was then objected that the rate was invalid because the major part of the vestrymen who made and signed the rate were not duly elected under the local act, inasmuch as they were not *resident* and *sleeping* within the parish of Sunderland. If that were a valid objection to the rate, I am of opinion that it might be raised by appeal to the quarter sessions, whether before or after a distress levied. This seems to me to be the reasonable construction of the 18th section of the local act. I also think it was not competent to the justices to inquire whether or not the vestry was properly constituted. If they could, I should have little hesitation in holding that *"inhabitants"* in s. 5 of the local act, do not necessarily mean persons *residing* and *sleeping* within the parish. From the time of H. 8 to the present time that word has in all statutes relating to rates been construed to mean *"rateable occupiers:"* I know of no case where it has been held that they must reside and sleep within the parish. In respect of a residence for the acquisition of a settlement, it is different. In answer to the fourth question put to us, therefore, I should be strongly inclined, if it were necessary to decide upon the meaning of the word *"inhabitants,"* to hold that it was not competent to the justices to inquire where the parties resided and slept, but that it was enough if they were rateable occupiers. It is not, however, essential that we should on this occasion express any opinion upon that point.

(a) See the definition of *"inhabitants"* given by Bayley, J., in *Donne v. Martyr*, 8 B. & C. 69 (E. C. L. R. vol. 15), 2 M. & R. 98, and by Littledale, J., in *The King v. Mashiter*, 6 Ad. & E. 153 (E. C. L. R. vol. 33), 1 Nev. & P. 314.



BYLES, J.—I also am of opinion that our answers to the questions put to us by the justices must be in favour of the respondents. I do not give any opinion upon the point; but I do not dissent from the view of \*my Lord as to the meaning of the word “inhabitant.” \*707] It is a very elastic word. Where an act of parliament gives an appeal against a rate, the justices are not at liberty to enter into questions of this nature. By the 18th section of this act, a double appeal is given,—first, against the assessment,—next, if any party shall find himself aggrieved by any distress or seizure. As to the limit, probably both are limited to three months. It clearly was not competent to the justices to entertain the objections. If it were, it would practically become impossible to levy the rate at all.

KEATING, J.—I am also clearly of opinion that it was not competent to the justices to enter into an inquiry as to the qualification of the vestrymen by whom the rate was made. By the local act, an appeal is given to the quarter sessions. If there were anything in the objection, it might properly be raised by an appeal to that tribunal. That being so, it is unnecessary for us upon the present occasion to decide whether “inhabitants” in s. 5 of the Sunderland local act means “residents” or persons who sleep within the parish. Although, therefore, I am by no means disposed to dissent from the opinion thrown out by the Lord Chief Justice, I do not wish to be understood as deciding it.

Appeal dismissed, with costs.

\*708]

\*EICHHOLZ v. BANNISTER. Nov. 17.

In the case of goods sold in an open shop or warehouse, there is an implied warranty on the part of the seller that he is the owner of the goods: and, if it turns out otherwise,—as, where the goods are claimed by the true owner, from whom they have been stolen,—the buyer may recover back the price as money paid upon a consideration which has failed.

THIS was an action for money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff, for money paid by the plaintiff for the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated: Claim, 19*l*. Plea, never indebted, whereupon issue was joined.

The cause was tried in the court of record for the trial of civil actions within the city of Manchester, before the deputy recorder, when the facts which appeared in evidence were as follows:—The plaintiff was a commission-agent at Manchester. The defendant was a job-warehouseman in the same place. On the 18th of April last, the plaintiff went to the defendant's warehouse, and there saw, amongst other goods which the defendant had just purchased, 17 pieces of prints, which he offered to buy of him at 5*½**d*. a yard. After some discussion, the defendant agreed to sell them, and gave the plaintiff an invoice in the following form, the whole of which was printed, with the exception of the parts in italics:—

"21, Chorlton Street, Portland Street,  
"Manchester. April 18th, 1864.

"Mr. Eichholz

"Bought of R. Bannister, Job-warehouseman

"Prints, Fents, Grey Fustians, &c. Job and perfect Yarns in Hanks, Cops, and Bundles.

"17 pieces of prints, 52 yds. at 5½d.

19 0 0

"1½ per cent. for cash

6 0

"£18 14 0"

\*The plaintiff paid for the goods before he left the warehouse, and the defendant sent them by a porter to the plaintiff's place of business. The plaintiff sold the lot a few days afterwards for 19l. 15s. net. The goods were subsequently returned to the plaintiff, they having been recognised as goods which had been stolen from the premises of one Krauss. The goods were taken possession of by the police, and the thief, one Aspinall, was tried at the general quarter sessions of the peace holden in and for the city of Manchester on the 9th of May last, and convicted, and sentenced to penal servitude for four years. [\*709]

On the part of the defendant, it was objected that there was no case to go to the jury, inasmuch as there is no implied warranty of title on the sale of goods.

For the plaintiff it was insisted that he was entitled to recover, the money having been paid upon a consideration which had wholly failed.

The learned judge directed a verdict to be entered for the plaintiff for the amount claimed, reserving leave to the defendant to move to set aside the verdict and enter a nonsuit or a verdict for the defendant, if the court should be of opinion that the plaintiff was not entitled to recover.

*Holker*, on a former day in this term, obtained a rule nisi accordingly.—He referred to *Crosse v. Gardner*, *Carthew* 90, *Pasley v. Freeman*, 3 T. R. 51, *Morley v. Attenborough*, 3 Exch. 500, and *Hall v. Conder*, 2 C. B. N. S. 22, 40 (E. C. L. R. vol. 89).

*C. Pollock* now showed cause.—The question is, whether there is any implied warranty of title upon a sale of goods. That there is such warranty according to the Roman,(a) the French,(b) the [\*710] \*American,(c) the Scotch, and almost every law of the continent of Europe, is clear: and there are not wanting authorities to show that it is so in the law of this country. "By the Civil law," says Blackstone (2 Bl. Com. 451), "an implied warranty was annexed to every sale, in respect of the title of the vendor; and so, too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose." In *Crosse v. Gardner*, *Carth.* 90, the plaintiff declared quod cum (on such a day) colloquium

(a) Cod. lib. 8, tit. 45. Dig. lib. 21, tit. 2

(b) Code Civil, art. 1626. Troplong. Ch. 4, De la Vente.

(c) *Armstrong v. Percy*, 5 Wend. 535; *Blasdale v. Babcock*, 1 J. R. 517; *Sedgwick on Damages*, 2d edit. 293; 2 Kent's Commentaries 478.

fuit between the plaintiff and the defendant concerning the buying and selling two oxen, which the defendant then had in his possession, and he (the defendant) *adtunc et ibidem falso et malitiose affirmabat* that those oxen were his (the defendant's) proper goods, to which the plaintiff giving credit bought the said oxen of the defendant for so much money, when in truth the said oxen then were the proper goods of T. S., and that he the said T. S. *postea, &c.*, lawfully recovered the said oxen from the plaintiff, and *licet* (the defendant) *sæpius requisit fuit*, yet he refused to give the plaintiff satisfaction for the same. Upon motion in arrest of judgment it was contended that the declaration was ill, because the plaintiff had not alleged that the defendant (*sciens* that these were the oxen of T. S.) did affirm them to be his oxen, nor allege this to be done *deceptivè*, nor set forth any warranty, but generally that the defendant did affirm these to be his (the defendant's) oxen, which was not sufficient to maintain the action, because a man may be mistaken in his property and right to a thing, without any fraud or ill intent. But the court held that \*711] *the action would lie upon a bare affirmation, ut suprâ,*"—referring to *Harvey v. Young*, *Yelv.* 20, *Bosden v. Thinne*, *Yelv.* 40, *Furnis v. Leicester*, *Cro. Jac.* 474, 1 *Rol. Abr.* 91, *Leakins v. Clissel*, 1 *Siderfin* 146, and *Ekins v. Tresham*, 1 *Lev.* 102. In *Medina v. Stoughton*, 1 *Ld. Raym.* 593, *Salk.* 210, it was held that an action lies against the seller of goods for affirming them at the time of the sale to be his own, when they were not, if he was in possession of them at the time of the sale; and that it is no answer that he bought them *bonâ fide*, and believed them to be his. Offering to sell generally is sufficient evidence of offering to sell as owner: per *Lee, C. J.*, in *Ryall v. Rowles*, 1 *Ves. sen.* 348, 351. And see the judgment of *Buller, J.*, in *Pasley v. Freeman*, 3 *T. R.* 56, 57. In *Morley v. Attenborough*, 3 *Exch.* 500, although the conclusion arrived at by the court is, that there is no implied warranty of title in the contract of sale of a personal chattel, yet many of the authorities referred to in the judgment delivered by *Parke, B.*, sustain the present argument: and the decision may well be warranted by the circumstance of the vendor being a pawnbroker and the subject of sale an unredeemed pledge. "With respect to *executory* contracts of purchase and sale," says that learned judge, "where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied, under similar circumstances, that a merchantable article was to be supplied. Unless goods which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery; and, if he did, and the goods were recovered \*712] from him, he would not be bound to pay, or, having \*paid, he would be entitled to recover back the price, as on a consideration which had failed. But, when there is a bargain and sale of a specific ascertained chattel, which operates to transmit the property, and nothing is said about title, what is the legal effect of that contract? Does the contract necessarily import, unless the contrary be expressed, that the vendor has a good title? or, has it merely the effect

of transmitting such title as the vendor has? According to the Roman law (vide Domat. Book 1, tit. 2, s. 2, art. 3), and in France (Code Civil, chap. 4, sect. 1, art. 1603) and Scotland, and partially in America (*Defreeze v. Trumper*, 1 Johns. R. 274, Broom's Maxims 628, where this subject is well discussed), there is always an implied contract that the vendor has the right to dispose of the subject which he sells (*Bell on Sale* 94): but the result of the older authorities is, that there is by the law of England no warranty of title in the actual contract of sale, any more than there is of quality. The rule of caveat emptor applies to both: but, if the vendor knew that he had no title, and concealed that fact, he was always held responsible to the purchaser as for a fraud, in the same way that he is if he knew of the defective quality. This rule will be found in Co. Litt. 102 a, 3 Rep. 22 a, Noy's Maxims 42, Fitz. Nat. Brev. 94 C., in *Sprigwell v. Allen*, Aleyn 91, cited by Littledale, J., in *Early v. Garrett*, 9 B. & C. 932 (E. C. L. R. vol. 17), 4 M. & R. 687, and in *Williamson v. Allison*, 2 East 469, referred to in the argument. Lord Hale says, 'Though the words *assign, set over, and transfer*, do not amount to a covenant against an eign title, yet as against the covenantor himself, it will amount to a covenant against all claiming under him,'—*Deering v. Farrington*, 3 Keble 304. It may be, that, as in the earlier times the chief transactions of purchase and sale were in markets and fairs, where the bonâ fide purchaser \*without notice obtained [\*713 a good title as against all except the Crown (and afterwards a prosecutor to whom restitution is ordered, by the 21 H. 8, c. 11), the common law did not annex a warranty to any contract of sale. Be that as it may, the older authorities are strong to show that there is no such warranty implied by law from the mere sale. In recent times a different notion appears to have been gaining ground (see note of the learned editor to 3 Rep. 22 a); and Mr. Justice Blackstone says, 'In contracts for sale it is constantly understood that the seller undertakes that the commodity he sells is his own;' and Mr. Wooddeson, in his Lectures, Vol. 2, p. 415, goes so far as to assert that the rule of caveat emptor is exploded altogether, which no authority warrants. At all times, however, the vendor was liable if there was a warranty *in fact*; and, at an early period, the affirming those goods to be his own by a vendor in possession, appears to have been deemed equivalent to a warranty. Lord Holt, in *Medina v. Stoughton*, 1 Salk. 210, Ld. Raym. 593, says, that, 'where one in possession of a personal chattel sells it, the bare affirming it to be his own amounts to a warranty;' and Mr. Justice Buller, in *Pasley v. Freeman*, 3 T. R. 57, disclaims any distinction between the effect of an affirmation, when the vendor is in possession or not, treating it as equivalent to a warranty in both cases. Some of the text-writers drop the expression of 'warranty' or 'affirmation,' and lay down in general terms, that, if a man sells goods *as his own*, and the title is deficient, he is liable to make good the loss: 2 Bl. Com. 451: the commentator cites for that position *Furnis v. Leicester*, Cro. Jac. 474, and 1 Roll. Abr. 70, in both which cases there was an allegation that the vendor *affirmed* that he had a title, and therefore it would seem that the learned author treated the expression 'selling as his own' as

\*714] equivalent to an \*affirmation or warranty. So, Chancellor Kent, in 2 Comm. 478, says, that, 'in every sale of a chattel, if the possession be in another, and there be no covenant or warranty of title, the rule of caveat emptor applies, and the party buys at his peril: but, if the seller has possession of the article, *and he sells it as his own*, and for a fair price, he is understood to warrant the title.' From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice Tindal, in *Ormrod v. Huth*, 14 M. & W. 664, it would seem that there is no implied warranty of title on the sale of goods, and that, if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by declarations, or conduct: and the question in each case, where there is no warranty in express terms, will be, whether there are such circumstances as to be equivalent to such a warranty. Usage of trade, if proved as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement; and, without proof of such usage, the very nature of the trade may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons. It is, perhaps, with reference to such sales, or to executory contracts, that Blackstone makes the statement above referred to. We do not suppose that there would be any doubt, if the articles were bought in a shop professedly carried on for the sale of goods, that the shop-keeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case, the vendor sells 'as his own,' and that is what is equivalent to a warranty of title. But, in the case now under consideration, the defendant can be made responsible only as *on a sale of a forfeited pledge, eo nomine*. The vendor must be \*considered as selling merely the

\*715] right to the pledge which he himself had." There is nothing in that judgment to militate against the claim of the plaintiff here. The circumstance of a tradesman selling goods in a public shop is a representation to all the world that that which he is selling is his own property. In *Chapman v. Speller*, 14 Q. B. 621 (E. C. L. R. vol. 68), the defendant at a sheriff's sale bought goods from the sheriff for 18*l*: the plaintiff, who was also at the sale, bought *the defendant's bargain* of him for 5*l*, and paid him the 23*l*: the defendant paid the sheriff the 18*l*, and the sheriff began to deliver the goods to the plaintiff, but they were then claimed as not being the property of the execution-debtor, and were recovered by the true owner: and, in an action upon an alleged warranty that the vendor (the defendant) had title to sell, it was held that there was no implied warranty by the defendant that he had title, nor any failure of consideration,—the plaintiff having paid the 23*l*. to the defendant, not for the goods, but for the right which the defendant had acquired by his purchase, and this consideration not having failed. But, in delivering judgment, Patteson, J., says: "In deciding for the defendant under these circumstances, we wish to guard against being supposed to doubt the right to recover back money paid upon an ordinary purchase of a chattel, where the purchaser does not have that for which he paid." In *Sims v. Marryat*, 17 Q. B. 281, 290 (E. C. L. R. vol. 79), Lord Campbell, in delivering judgment, says, obiter,—“I do not think it

necessary to inquire what the law would be in the absence of an express warranty. On that point the law is not in a satisfactory state. The decision in *Morley v. Attenborough*, 3 Exch. 500, was, that a pawnbroker, selling an unredeemed pledge as such, did not warrant the title of the pawnor. Of that decision I approve: but a [\*716 great many questions, beyond \*the mere decision, arise on the very able judgment of the learned Baron in that case, which I fear must remain open to controversy. It may be that the learned Baron is correct in saying, that, on a sale of personal property, the maxim of *caveat emptor* does by the law of England apply: but, if so, there are many exceptions stated in the judgment which well nigh eat up the rule. Executory contracts are said to be excepted; so are sales in retail shops, or where there is a usage of trade: so that there may be difficulty in finding cases to which the rule would practically apply." [ERLE, C. J., referred to *Noy's Maxims*, c. 42, p. 89 (Bythewood's edit. 209), where it is said, "If I take the horse of another man, and sell him, and the owner take him again, I may have an action of debt for the money; for, the bargain was perfect by the delivery of the horse; and *caveat emptor*."] That can hardly be considered law at this day.

*Holker*, in support of his rule.—The real question is, whether there is a warranty of title to goods sold in a shop or warehouse; or, in other words, whether the money which the buyer has paid for them, can, if the vendor turns out to have no title, be recovered back as upon a failure of consideration. As a general rule, there is by the law of England, whatever may be the law of other commercial countries, no implied warranty of title on the sale of a chattel. The law is the same with respect to warranty of title to land as of title to goods. [BYLES, J.—Chancellor Kent, in his *Commentaries*, Vol. 2, p. 478, states the contrary to be the law of England as well as that of America.] The English authorities he refers to, (a) with the exception of the \*passage in *Blackstone*, do not bear him out. [\*717 The rule is clearly laid down by Tindal, C. J., in *Ormrod v. Huth*, 14 M. & W. 651, 664,—“The rule which is to be derived from all the cases appears to us to be, that, where upon the sale of goods the purchaser is satisfied without requiring a warranty (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If indeed, the representation was false to the knowledge of the party making it, this would in general be conclusive of fraud: but, if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of *caveat emptor* applies, and the representation itself does not furnish a ground of action. And, although the cases may, in appearance, raise some difference as to the effect of a false assertion or representation of *title* in the seller, it will be found, on examination, that in each of those cases there was either an assertion of title embodied in the contract, or a representation of title which was false to the knowledge of the seller.” That, it is sub-

(a) 2 Bl. Com. 451, *Bacon's Abridgment, Actions on the Case* (E), *Comyn on Contracts*, Part 3, Ch. 8, *Stuart v. Wilkins*, Dougl. 18, and *Parkinson v. Lee*, 2 East 314.

mitted, is a correct exposition of the law upon the subject: and it has never been questioned. Almost all the authorities are referred to and commented upon in *Morley v. Attenborough*; and the result arrived at is, that, by the common law of England, there is no implied warranty of title from the mere contract of sale of a chattel. The doctrine is still further carried out in *Hall v. Conder*, 2 C. B. N. S. 22, 40 (E. C. L. R. vol. 89), where Williams, J., in delivering the judgment of the court, says: "With regard to the sale of ascertained chattels, it has been held that *there is not any implied warranty of* \*718] *either title or quality*, unless there are some circumstances \*beyond the mere fact of a sale, from which it may be implied. The law on this subject was very fully explained by Parke, B., in giving the judgment of the Court of Exchequer in *Morley v. Attenborough*." [ERLE, C. J.—In both those cases, the dicta you rely on were extra-judicial, not necessary to the determination of the question in issue.] They are, at all events, strong expressions of opinion. [ERLE, C. J.—Very.] In a note to *Williamson v. Allison*, 2 East 448, the following MS. note of *Sprigwell v. Allen* (Aley 91), by Burnet, J., is given,—“In an action on the case for selling a horse as the defendant's own, when in truth it was the horse of A. B., upon not guilty pleaded, it appeared that the defendant bought the horse in Smithfield, but did not take care to have him legally tolled: yet, as the plaintiff could not prove that the defendant knew it to be the horse of A. B., the plaintiff was nonsuited; for, the *scienter* or *fraud* is the gist of the action *where there is no warranty*; for, there the party takes upon himself the knowledge of the title to the horse and of his qualities.” The note goes on,—“See also *Chandler v. Lopus*, in the Exchequer Chamber, Cro. Jac. 4, to the same purpose. The same MS. also refers to another case: ‘So, if a man sell six blank lottery tickets, and afterwards another, as owner of these tickets, recover them of the vendee, unless the vendor *knew* them to be the property of another, or *warranted them*, neither this action (under the title Case of torts in nature of deceit and other wrongs) nor assumpsit for money had and received to the vendee's use will lie. Per Holt, C. J., *Paget v. Wilkinson*, Tr. 8 W. 3, Guildhall.’ And see *Denison v. Ralphson*, 1 Vent. 366, where an opinion is given on the very point in question; for, on the second count, which stated a *warranty* that the goods sold were good and merchantable, and averred that \*719] the defendant delivered them \*bad and not merchantable, *knowing* them to be naught, the court observe, that, though the declaration be ‘*knowing* them to be naught,’ yet the *knowledge need not be proved in evidence*.” [ERLE, C. J.—If I sell an article as my article, is not that a contract that the article is mine? Has any court *decided*, that, under such circumstances, the money paid is not recoverable back, if it turn out that the seller has no title?] In *Walker's Case*, 3 Co. Rep. 22 a, it is laid down, that, “if a man sell goods for money to be paid at several days, in such case, although the goods be taken by one who hath right before the day, yet the seller shall have an action of debt in respect of the contract.” To which is added in the note,—“And, unless the seller knew the goods to be the property of another, or warranted them, the buyer must bear the loss; for, the rule is, *caveat emptor*,—citing 1 Inst. 102 a, 2

Inst. 247. [ERLE, C. J.—That is merely talking, not adjudging.] In *Early v. Garrett*, 9 B. & C. 928 (E. C. L. R. vol. 17), 4 M. & R. 687, Littledale, J., says: "It has been held, that, where a man sells a horse as his own, when in truth it is the horse of another, the purchaser cannot maintain an action against the seller, unless he can show that the seller knew it to be the horse of the other at the time of the sale,—the scienter or fraud being the gist of the action *where* there is no warranty, for there the party takes upon himself the knowledge of the title to the horse, and of his qualities." [ERLE, C. J., referred to *Brown v. Edgington*, 2 M. & G. 279 (E. C. L. R. vol. 40), 2 Scott N. R. 496.] In Broom's Legal Maxims, 4th edit. 768, the result of the authorities, ancient and modern, is thus summed up,—"Upon the whole, we may safely conclude, that, with regard to the sale of ascertained chattels, there is not any implied warranty of either *title* or *quality*, unless there are some circumstances beyond the mere fact of a sale, from which it may be implied." The mere [\*720] fact of the sale taking place in a shop surely cannot make any difference. As to the failure of consideration, that raises very nearly the same question. "It may be," says Parke, B., in *Morley v. Attenborough*, 3 Exch. 514, "that, though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money, as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But, if there is no implied warranty of title, some circumstances must be shown to enable the plaintiff to recover for money had and received." In the present case, the defendant sold in the usual and ordinary course of business, without any warranty or representation of any sort, and without any knowledge that he had not the full right openly to sell that which he had as openly bought. To hold that any implication of warranty of title arises under such circumstances will be to establish a doctrine, not only new to the law of England, but fraught with inconveniences the extent of which cannot well be foreseen.(a)

ERLE, C. J.—I am of opinion that this rule should be discharged. The plaintiff brings his action to recover back money which he paid for goods bought by him in the shop of the defendant, which were afterwards lawfully claimed from him by a third person, the true owner, from whom they had been stolen. The plaintiff now claims to recover back the money as having been paid by him upon a consideration which has failed. The jury at the trial found a verdict for the plaintiff, under the direction of the learned judge who presided; and a rule has been obtained on behalf of \*the defendant to [\*721] set aside that verdict and to enter a nonsuit, on the ground that it is part of the common law of England that the vendor of goods by the mere contract of sale does not warrant his title to the goods he sells, that the buyer takes them at his peril, and that the rule *caveat emptor* applies. The case has been remarkably well argued on both sides; and the court are much indebted to the learned coun-

(a) See *Lee v. Bayes*, 18 C. B. 599 (E. C. L. R. vol. 86).



sel for the able assistance they have rendered to them. The result I have arrived at, is, that the plaintiff is entitled to retain his verdict. I consider it to be clear upon the ancient authorities, that, if the vendor of a chattel by word or conduct gives the purchaser to understand that he is the owner, that tacit representation forms part of the contract, and that, if he is not the owner, his contract is broken. So is the law laid down in the very elaborate judgment of Parke, B., in *Morley v. Attenborough*, 3 Exch. 500, 513, where that learned judge puts the case upon which I ground my judgment. A difference is taken in some of the cases between a warranty and a condition: (a) but that is foreign to the present inquiry. In *Morley v. Attenborough*, 3 Exch. 513, Parke, B., says: "We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title." No doubt, if a shopkeeper in words or by his conduct affirms at the time of the sale that he is the owner of the goods, such affirmation becomes part of the contract, and, if it turns out that he is not the owner, so that the goods are lost to the buyer, the price which he has \*722] received may be recovered back. \*I ventured to throw out some remarks in the course of the argument upon the doctrine relied on by Mr. Holker, which he answered by assertion after assertion coming no doubt from judges of great authority in the law, to the effect that upon a sale of goods there is no implied warranty of title. The passage cited from Noy certainly puts the proposition in a manner that must shock the understanding of any ordinary person. But I take the principle intended to be illustrated to be this,—I am in possession of a horse or other chattel: I neither affirm or deny that I am the owner: if you choose to take it as it is, without more, caveat emptor: you have no remedy, though it should turn out that I have no title. Where that is the whole of the transaction, it may be that there is no warranty of title. Such seems to have been the principle on which *Morley v. Attenborough* was decided. The pawnbroker, when he sells an unredeemed pledge, virtually says,—I have under the provisions of the statute (b) a right to sell. If you choose to buy the article, it is at your own peril. So, in the case of the sale by the sheriff of goods seized under a *fi. fa.*,—*Chapman v. Speller*, 14 Q. B. 621 (E. C. L. R. vol. 68). The fact of the sale taking place under such circumstances is notice to buyers that the sheriff has no knowledge of the title to the goods; and the buyers consequently buy at their own peril. Many contracts of sale tacitly express the same sort of disclaimer of warranty. In this sense it is that I understand the decision of this court in *Hall v. Conder*, 2 C. B. N. S. 22 (E. C. L. R. vol. 89). There, the plaintiff merely professed to sell the patent-right such as he had it, and the court held that the contract might still be enforced, though the patent was ultimately defeated on the ground of want of novelty. The thing which was the subject

(a) See *Bannerman v. White*, 10 C. B. N. S. 844 (E. C. L. R. vol. 100).

(b) 39 & 40 G. 3, c. 99, s. 17.

of the contract there was not matter, it was \*rather in the nature of mind. These are some of the cases where the conduct of the seller expresses at the time of the contract that he merely contracts to sell such a title as he himself has in the thing. But, in almost all the transactions of sale in common life, the seller by the very act of selling holds out to the buyer that he is the owner of the article he offers for sale. The sale of a chattel is the strongest act of dominion that is incidental to ownership. A purchaser under ordinary circumstances would naturally be led to the conclusion, that, by offering an article for sale, the seller affirms that he has title to sell, and that the buyer may enjoy that for which he parts with his money. Such a case falls within the doctrine stated by Blackstone, and is so recognised by Littledale, J., in *Early v. Garrett*, 9 B. & C. 928 (E. C. L. R. vol. 17), 4 M. & R. 687, and by Parke, B., in *Morley v. Attenborough*, 3 Exch. 518. I think justice and sound sense require us to limit the doctrine so often repeated, that there is no implied warranty of title on the sale of a chattel. I cannot but take notice, that, after all the research of two very learned counsel, the only semblance of authority for this doctrine from the time of Noy and Lord Coke consists of mere dicta. These dicta, it is true, appear to have been adopted by several learned judges, amongst others by my excellent Brother Williams, whose words are almost obligatory on me: but I cannot find a single instance in which it has been more than a repetition of barren sounds, never resulting in the fruit of a judgment. This very much tends to show the wisdom of Lord Campbell's remark in *Sims v. Marryat*, 17 Q. B. 291 (E. C. L. R. vol. 79), that the rule is beset with so many exceptions that they well nigh eat it up. It is to be hoped that the notion which has so long prevailed will now pass away, and that no further impediment will be placed in the way of a buyer recovering back \*money which he has parted with upon a consideration which has failed. [724]

BYLES, J.—I also am of opinion that this rule should be discharged. It has been said over and over again that there is no implied warranty of title on the mere sale of a chattel. But it is certainly, as my Lord has observed, barren ground; not a single judgment has been given upon it. In every case, there has been, subject to one single exception, either declaration or conduct. Chancellor Kent, 2 Com. 478, says: "In every sale of a chattel, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of caveat emptor applies, and the party buys at his peril;" for which he cites the dicta of Lord Holt in *Medina v. Stoughton*, 1 Salk. 210, 1 Ld. Raym. 523, and of Buller, J., in *Pasley v. Freeman*, 3 T. R. 57, 58. "But," he goes on, "if the seller has possession of the article, and he sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title." Thus the law stands that, if there be declaration or conduct or warranty whereby the buyer is induced to believe that the seller has title to the goods he professes to sell, an action lies for a breach. There can seldom be a sale of goods where one of these circumstances is not present. I think Lord Campbell was right when he observed that the exceptions had well nigh eaten up the rule.

KEATING, J.—I am of the same opinion. Whether it be an excep-

tion to the rule or a part of the general rule, I think we do not controvert any decided case or dictum when we assert, that, under circumstances like those of the present case, the seller of goods warrants that he has title. These goods were bought in the defendant's shop \*725] in the ordinary course of business. He \*gives an invoice with them, which represents that he is selling them as vendor in the ordinary course. I think the case falls within that put by Parke, B., in *Morley v. Attenborough*, 8 Exch. 513, of a sale in a shop, which he treats as a circumstance which beyond all doubt gives rise to a warranty of ownership. I was somewhat pressed by Mr. Holker's question whether there is more affirmance of title in the case of a sale in a shop than in a sale elsewhere. It may be that the distinction is very fine in certain cases. If a man professes to sell without any qualification out of a shop, it is not easy to see why that should not have the same operation as a sale in the shop. It is not necessary, however, to decide that question now. Here, the sale took place in a public shop, in the ordinary way of business, and every circumstance concurs to bring the case within the distinction put by Parke, B., in *Morley v. Attenborough*. Rule discharged.

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PODMORE v. SCHMIDT. Nov. 19.

The judge having at the trial substituted for the defendant on the record the name of the person really intended to be sued, and directed a verdict to be entered for the plaintiff against that person "sued as, &c.," the court refused to order a verdict to be entered for the defendant named originally on the record, for the purpose of enabling him to get costs,—there being suspicion of collusion.

THIS was an action by the plaintiff, a stock-jobber, to recover from the defendant, who carried on the business of a print-dealer, in Crown Street, Finsbury, the sum of 32*l.* 10*s.*, the amount of loss sustained on a sale of Greek stock, which the plaintiff had bought for a person who \*726] came to him with Schmidt's card. The \*writ of summons was left with a shopman at the defendant's place of business in Crown Street, and was by him handed to the defendant. The defendant took it to his attorney, who gave an undertaking to appear, and afterwards pleaded to the action.

The cause came on for trial before Willes, J., at the first sitting in London in this term. Upon the defendant being called, the plaintiff was asked if he was the party with whom he had been dealing and whom he intended to sue. He replied that he was not: and he identified another person in court (one Louis Rochefort, who managed the defendant's business,) as the person who had employed him, presenting the defendant's card. The defendant swore that he never had had any transaction in buying or selling stock, nor had he authorized Rochefort to do so in his name. Rochefort was then called, when he admitted that he had employed the plaintiff to buy and sell the stock in question, and that he did so on his own account, having no authority from Schmidt to use his name in the transaction.

The learned judge thereupon directed the jury to find a verdict for the plaintiff for the sum claimed, against Louis Rochefort "sued as Philipp Schmidt."

*Pearce* now moved to enter a verdict for Schmidt. The motion was founded upon an affidavit of Schmidt detailing the above facts, and stating that "he never informed Rochefort what steps had been taken in this cause before the 8th of November instant, and that he (Rochefort) was not aware from any information which he (Schmidt) had given him, either directly or indirectly, that a plea had been delivered in this cause." The managing clerk of Schmidt's attorney also swore, that, on the 8th of November, he ascertained for the first time that Rochefort was the person who had been dealing with the plaintiff, whereupon he immediately \*caused notice of that fact to be [\*727 given to the plaintiff's attorneys; that he had no instructions to appear for Rochefort; that judgment had been signed, and the costs taxed; and that he had been informed by the plaintiff's attorney, that, if he could find Schmidt, he would take him in execution on the judgment. [ERLE, C. J.—Upon the verdict as entered, Schmidt can be in no jeopardy. What is the real object of the motion?] That Schmidt may have his costs.

ERLE, C. J.—I do not think we ought to interfere, under the circumstances. The whole transaction is replete with suspicion.

The rest of the court concurring, *Pearce* took nothing.

#### In re SPARKS. Nov. 2.

The court will not strike an attorney off the rolls, where he has become bankrupt having moneys of a client in his hands which ought to have been paid over, unless a clear case of fraudulent misappropriation be made out against him.

GARTH, in Trinity Term last, instructed by The Incorporated Law Society, obtained a rule calling upon Mr. Sparks to show cause why his name should not be struck off the roll of attorneys of this court, on the ground that he had improperly appropriated to his own use moneys which had come to his hands in his character of attorney.

The motion was founded upon an affidavit of one Lockington, the client, and also an affidavit verifying the proceedings in bankruptcy under a petition filed by Sparks under the Bankruptcy Act, 1861. Lockington in his affidavit stated, that, in May, 1862, he employed Sparks to recover a debt of 65*l.* 2*s.* due to him \*from Messrs. [\*728 T. & C.; that he afterwards called on Sparks to inquire what he had done in the matter, when he told him he had received certain bills, but was pressing for security; that he called again several times at Sparks's office, but received evasive answers, and was unable to see him; that, in January, 1863, he saw Sparks, and, in answer to inquiries, was informed by him that a part of the money had been paid, but that there still remained 31*l.* unpaid, which he expected to get in about a fortnight, when he would pay it all together; that he subsequently made applications for the money or for information respecting it, without being able to obtain any; that he was informed and believed that Sparks did receive as his attorney the sum of 51*l.* 9*s.* 6*d.* in or previously to the month of August, 1862; and that Sparks never informed him that he had received that sum.

In his examination before the commissioner, Sparks admitted having—  
C. B. N. S., VOL. XVII.—28

ing on the 14th of May, 1862, received from Messrs. T. & C. two bills of exchange amounting together to 51*l.* 9*s.* 6*d.*, which he discounted with his bankers, applying the proceeds to his own use. He further stated that the bills were dishonoured at maturity, that he repaid the amount to his bankers, and afterwards, in August, 1862, received from the parties to the bills the amount thereof in cash, and applied it to his own use.

By the proceedings in bankruptcy it appeared that, upon Sparks coming up for his discharge, "it was adjudged by the court that the said bankrupt could not have had at the time when Mr. Lockington's debt was contracted any reasonable or probable ground or expectation of being able to pay the same, and that the bankrupt's insolvency was attributable greatly to unjustifiable extravagance in living; and that \*729] the order of discharge be suspended for nine months from this \*date (16th December, 1863), with protection for one month from this day; but, after the expiration of such month, no further protection is to be granted until the bankrupt has been without protection for six months."

*Morgan Lloyd* and *Butler Rigby* now showed cause.—They produced the affidavit of Sparks, in which he stated that his discharge by the bankruptcy court had been opposed by Lockington on the same ground as that upon which it was now sought to strike him off the roll; and he attributed his bankruptcy to a severe attack of illness which had for some time succeeding Christmas, 1862, incapacitated him from attending to business: and also the affidavits of five respectable individuals (to one of whom, a relative, he was indebted at the time of his bankruptcy in the sum of 2000*l.* and upwards, and to another in the sum of 280*l.*), who deposed that they had severally employed Sparks as their attorney for periods varying from ten to twenty years, that he had always transacted their business to their entire satisfaction, and that they were willing to employ him again as their attorney.

The court will not lend its aid in this stringent course of proceeding to compel an attorney to pay a debt which is barred by his certificate, nor will they punish him for an offence for which he has already under the order of the court of bankruptcy been punished by six months' suspension from practice. In *Ex parte Culliford*, 8 B. & C. 220 (E. C. L. R. vol. 15), the Court of Queen's Bench refused to compel an attorney to pay a sum of money which he had received in his character of attorney; he having, as here, after the receipt of the money, become bankrupt and obtained his certificate,—*Bayley, J.*, saying: "If an action were brought against Warren for money had and \*730] received, the certificate \*might be pleaded in bar." (a) Besides, here, the affidavit of Mr. Lockington falls very far short of showing that any wilful deceit with reference to the receipt of the money in question had been practised upon him.

*Kay* (with whom was *Garth*) submitted that the bankrupt's own admissions in his examination before the commissioner established a clear case of fraud and misrepresentation by him, and a wilful mis-

(a) And see *Baron v. Martell*, 9 D. & R. 390; *The King v. Edwards*, 9 B. & C. 652 (E. C. L. R. vol. 17); *In re Bonner*, 1 Nev. & M. 555, 4 B. & Ad. 811 (E. C. L. R. vol. 24).

appropriation of his client's money, which rendered it inexpedient that he should be permitted to remain upon the roll of attorneys.

ERLE, C. J.—I have listened attentively to the affidavits and to the arguments which have been urged by counsel; and, though the case is one of grave suspicion, I cannot say that I find any specific misappropriation of the client's money which would warrant me in taking the extreme course of removing this gentleman from the roll of attorneys. I therefore think the rule must be discharged; but, under the circumstances, I think it should be discharged without costs.

The rest of the court concurring.

Rule discharged, without costs.

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\*SAUNDERS *v.* BEST. Nov. 24.

[\*731

The 154th section of the Bankruptcy Act, 1861, discharges the bankrupt from liability to a surety in respect of payments of premiums on a policy of insurance becoming due subsequently to the date of the adjudication.

THE defendant in the year 1853 assigned to one Hardwick a policy of insurance upon his life, the plaintiff joining him as surety, and covenanting to pay the premiums which should from time to time become due. In April, 1862, the defendant became bankrupt, and obtained his order of discharge on the 30th of June, 1862. In December, 1863, the plaintiff paid the premium due upon the policy, amounting to 10*l.* 19*s.* 2*d.*, and brought this action. The defendant pleaded, amongst other pleas, his bankruptcy and certificate.

The cause was tried before the undersheriff of Worcestershire on the 9th of August last, when a verdict was found for the plaintiff for the sum claimed; leave being reserved to the defendant to move to enter a verdict for him, or a nonsuit, if the court should be of opinion that the 154th section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, made the subsequently accruing premiums a debt provable under the defendant's bankruptcy.

*T. S. Pritchard*, on a former day in this term, obtained a rule nisi accordingly.—He referred to the cases of *Warbury v. Tucker*, 5 Ellis & B. 384 (E. C. L. R. vol. 85), (affirmed on error, Ellis, B. & E. 914 (E. C. L. R. vol. 96)), and *Young v. Winter*, 16 C. B. 401 (E. C. L. R. vol. 81), decided upon the 178th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, and to the 154th section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, which was expressly introduced for the purpose of meeting the difficulty presented by that class of cases, and which provides, that, "if any bankrupt shall at the time of adjudication be liable by reason of any contract or [\*732 \*promise to pay premiums upon any policy of insurance, or any other sum of money, whether yearly or otherwise, or to repay to or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise may, if he think fit, apply to the court to set a value upon his interest under such contract or promise, and the court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon."

*Griffiths*, who was instructed to show cause, submitted that the 154th section of the Bankruptcy Act, 1861, merely gave the surety in a case like this permission to call upon the court of bankruptcy, if he thought fit, to set a value upon his interest in the contract, leaving him to the option of resorting to any other remedy he might have against the bankrupt.

*Digby Seymour*, Q. C., and *Pritchard*, were not required to support the rule.

ERLE, C. J.—By the 161st section of the Bankruptcy Act, 1861, the order of discharge frees the bankrupt from “all debts, claims, or demands provable under his bankruptcy.” A debt which the creditor has the option of proving is a debt provable. The rule must be absolute to enter a nonsuit.

The rest of the court concurring,

Rule absolute.

(d) See *Doria & Macrae's Law of Bankruptcy*, Vol. 1, 741, and *Shelford's Law of Bankruptcy*, 3d edit. 478, 543.

\*733] **\*INCHBALD v. THE WESTERN NEILGHERRY COFFEE, TEA, AND CINCHONA PLANTATION COMPANY (LIMITED).** Nov. 10.

The plaintiff was retained, by resolution of the directors of a public company, as broker, to dispose of the shares therein, upon the terms that he was to receive 100*l.* down, and 400*l.* more when all the shares should have been allotted. By the act of the directors, without any default on the part of the plaintiff, the company was wound up before the whole of the shares had been disposed of:—Held, that the plaintiff was entitled to recover, as damages for the breach of contract, such sum as a jury (or the court substituted for a jury) should think reasonable.

THIS was an action for the breach of a contract by the company to employ the plaintiff as their broker to dispose of shares.

The special count of the declaration stated that it was agreed between the plaintiff and the defendants that the plaintiff should become stock-broker to the defendants in and about the selling and disposing of shares in the said company, for reward to the plaintiff in that behalf to be paid by the defendants, that is to say, 100*l.* to be paid down, and 400*l.* in addition on the allotment of the whole of the shares of the said company; that thereupon, in consideration of the premises, and that the plaintiff then promised the defendants to fulfil the said agreement on his part, the defendants then promised the plaintiff to permit and suffer him to act as such broker, and to sell and dispose of the said shares for the defendants as aforesaid: General averment of performance of all conditions precedent, &c.: Breach, that the defendants, without any reasonable cause or pretence, wrongfully refused to permit the plaintiff to act as such broker, or to sell and dispose of the said shares for the defendants as aforesaid, whereby the plaintiff was prevented from earning the said sum of 400*l.* so to be paid to him in addition as aforesaid.

There was also a count for work and labour and commission as a broker.

The defendants pleaded to the special count, a denial of the promise, and a traverse of the breach as alleged, and, to the common count, never indebted, and payment. Issue thereon.

The cause was tried before Williams, J., at the \*sittings in London after Easter Term last, when the following facts appeared in evidence:—The Western Neilgherry Coffee, Tea, and Cinchona Plantation Company (Limited), was alleged by the prospectus to be incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89), whose capital was to consist of 50,000*l.*, in 10,000 shares of 5*l.* each: and it was stated that the company was formed for the purpose of purchasing and cultivating coffee, tea, and cinchona upon certain freehold and leasehold estates in the Madras presidency,—the purchase-money for which was to be 30,000*l.*, one-third of which was to be taken in shares by the vendor. The prospectus further stated that “the directors had entered into an arrangement with the vendor (a gentleman for the last twenty years a resident on the Neilgherry Hills, during which time he had made the cultivation of coffee his chief occupation), whereby he agreed to accept the superintendence of the property, and to guarantee an average minimum profit of 8 per cent. per annum on all paid-up capital for five years, and to double the present crop within the same period; and, as security for the fulfilment of this guarantee, he was to leave 5000*l.* and the 2000 shares, parts of the purchase-money, and the interests and dividends thereof respectively, in the hands of the company;” that “it was not intended to call for more than 30,000*l.* of the proposed capital of 50,000*l.* during the first three years’ operation of the company;” that “2260 shares had been already subscribed for;” and that “applications for the remaining shares must be addressed to the bankers or *broker*, or to the secretary.”

It being of importance to the efficient starting of the company that a broker conversant with that sort of business, and having a large and influential connection among capitalists, should be employed to dispose of the shares, the secretary communicated with \*the plaintiff, who was a member of the Stock-Exchange, and in December, 1862, the directors passed a resolution appointing the plaintiff to be the stock-broker of the company, on the terms that he was to receive 100*l.* down, and 400*l.* more on the allotment of the whole of the shares in the company. [735]

The 100*l.* was accordingly paid to the plaintiff, and he proceeded to get subscribers for shares. On the 21st of January, 1863, at a meeting of the directors, at which the plaintiff was present, some dissatisfaction was expressed at the small progress made, and it was proposed that the remaining shares should be taken up amongst the directors themselves. But, in May following, in consequence of the agent with whom the company had been in treaty for the purchase of the estates turning out not to have authority from the owner (Mr. Lascelles) to sell on the terms proposed, and the latter refusing to ratify the contract, the directors found themselves unable to form a company, and accordingly they sent circulars to the holders of shares, informing them that they found it expedient to wind up the concern, and that the deposits would be returned,—which they subsequently were, with 8 per cent. interest. The directors were aware as early as February, 1863, of the difficulty as to the purchase, but no communication was made by them to the plaintiff on the subject.

The plaintiff, on learning that the company was wound up, demanded



the stipulated 400*l.*, which the directors refused to pay, on the ground that the whole number of shares had not been allotted. Whereupon this action was brought.

The defence above suggested being relied on at the trial, it was contended on the part of the plaintiff, on the authority of *Planchè v. Colburn*, 8 Bingh. 14 (E. C. L. R. vol. 21), 1 M. & Scott 51, that, \*736] inasmuch as he had been prevented by \*the act of the defendants from disposing of the remaining shares, he was entitled to recover the whole stipulated reward, just as if he had performed the work.

A verdict was taken, by consent, for the plaintiff, for 400*l.*, the right of the plaintiff to recover, and the amount of damages he was entitled to, being left for the decision of the court.

*E. James*, Q. C., in Trinity Term last, obtained a rule nisi accordingly.—He sought to distinguish the case from *Planchè v. Colburn*, on the ground that there it was the voluntary act of Colburn which prevented *Planchè* from fulfilling the engagement; whereas, here, the non-fulfilment arose from a circumstance over which the directors had no control. He also referred to the authorities collected in the notes to *Cutter v. Powell*, 2 Smith's Leading Cases, 5th edit. p. 1.

*Karslake*, Q. C., and *H. James*, now showed cause.—The plaintiff being ready to perform the services for which he was retained, and the company having by winding up put it out of their power to permit the plaintiff to go on placing the shares, however discreetly the directors may have acted, they are clearly liable to pay him the stipulated remuneration under the special contract, or at all events a reasonable remuneration under the common counts. *Planchè v. Colburn*, 8 Bingh. 14 (E. C. L. R. vol. 21), 1 M. & Scott 51, is precisely in point. There, the defendants engaged the plaintiff to write a treatise for a periodical publication. The plaintiff commenced the treatise, but, before he had completed it, the defendants abandoned the publication: and it was held that the plaintiff might sue for compensation, without delivering or tendering the treatise. To the same effect is *Prickett v. Badger*, 1 C. B. N. S. 296 (E. C. L. R. vol. 87), \*737] where it was held, that, where an \*agent employed for an agreed commission to sell land at a given price, succeeds in finding a purchaser at the stipulated price, but the principal, *from whatever cause*, declines to sell, and rescinds the agent's authority, the latter is entitled to sue for a reasonable remuneration for his work and labour, and is not bound to resort to a special action for the wrongful withdrawal of the authority. "The defendant having declined," said Crowder, J., "from whatever cause, to sell the land after the plaintiff had succeeded in procuring a purchaser willing to take it at the price proposed, and the plaintiff having thus done all he could to entitle him to the stipulated commission, the Lord Chief Baron ruled, that, although the plaintiff could not maintain an action upon the special contract, he was nevertheless entitled to recover upon the common count a reasonable remuneration for his work and labour. In this I am of opinion he was quite right. His ruling is perfectly consistent with the law as laid down in the notes to the case of *Cutter v. Powell*, 6 T. R. 320, in 2 Smith's Leading Cases 1. At p. 16 [5th edit. 17], the learned editors say, 'It is an invariably true proposi-

tion, that, wherever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or *has disabled himself from performing it by his own act*, the other party has thereupon a right to elect to rescind it, and may, on doing so, *immediately* sue on a quantum meruit for anything which he had done under it previously to the rescission: this, it is apprehended, is established by *Withers v. Reynolds*, 2 B. & Ad. 882, *Planchè v. Colburn*, 8 Bing. 14 (E. C. L. R. vol. 21), 1 M. & Scott 51, *Franklin v. Miller*, 4 Ad. & E. 599 (E. C. L. R. vol. 31), *Prickett v. Badger*, 1 C. B. N. S. 296 (E. C. L. R. vol. 87), and other cases.' " [WILLIAMS, J., referred to *Moffat v. Laurie*, 15 C. B. 588 (E. C. L. R. vol. 80).] That was a very peculiar case, and has no application to the circumstances of this \*case. If the directors here had a valid contract with [\*738 the proposed vendor of the estates, they should have enforced it. If they had not, they should not have acted so precipitately.

*Prentice*, in support of the rule.—It may be that the directors would be liable in a special action upon an implied contract that they would not do anything to prevent the plaintiff from earning the stipulated remuneration. But the question here is, whether the plaintiff is in a position to maintain an action upon a quantum meruit. The defendants have been guilty of no wilful default: it is solely by the wrongful act of a third party that they are prevented from perfecting the contemplated arrangements. The case, therefore, differs materially from *Planchè v. Colburn*, where the defendant by his own act made it impossible that the contract should be carried out. In the notes to *Cutter v. Powell*, 2 Smith's Leading Cases 32, it is said: "The next exception to the general rule that no action of *indebitatus assumpsit* will lie while the special contract remains unperformed, is to be found in a class of cases which establish the proposition, that, when one party has absolutely refused to perform, or has incapacitated himself from performing, his side of the contract, the other party may rescind the contract, and sue for what he has already done under it, upon a quantum meruit. That he may rescind it upon an *absolute* refusal by the other party to perform his part, is proved by *Withers v. Reynolds*, 2 B. & Ad. 882 (E. C. L. R. vol. 22). There, the plaintiff having refused to pay for the loads on delivery, pursuant to his contract, the defendant was held entitled to rescind it. 'If the plaintiff,' said Patteson, J., 'had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw: but the \*plaintiff here expressly [\*739 *refuses* to pay for the loads as delivered; the defendant is therefore not liable for ceasing to perform his part of the contract.' This case was commented on in *Franklin v. Miller*, 4 Ad. & E. 599 (E. C. L. R. vol. 31), and the same doctrine laid down. 'The rule is,' said Coleridge, J., 'that, in rescinding, as in making a contract, both parties must concur. In *Withers v. Reynolds*, each load of straw was to be paid for on delivery. When the plaintiff said he would not pay for his loads on delivery, that was a *total* failure, and the defendant was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract. The refusal which is to authorize the rescission of the contract must be an unqualified one:" and, it may be added, a voluntary one, like that which

took place in *Short v. Stone*, 8 Q. B. 358 (E. C. L. R. vol. 55). In *Prickett v. Badger*, 1 C. B. N. S. 296 (E. C. L. R. vol. 87), the plaintiff had done all he was retained to do, and therefore had earned his commission. So, in *Green v. Reed*, 3 Fost. & Fin. 226. In *Simpson v. Lamb*, 17 C. B. 603 (E. C. L. R. vol. 84), A. employed B., a clerical agent, to offer an advowson for sale, upon an understanding that, in the event of a sale being effected through the agency of B., the latter should receive a commission of 5 per cent. upon the amount of the purchase-money. A. afterwards, without communicating with B., sold the living himself. In an action charging a *wrongful revocation of the authority*, it was held, that in the absence of evidence of expense or liability incurred by B., he was not entitled to recover anything. No wrongful act is imputable to the defendants here. [BYLES, J.—What do you conceive is the obligation into which the defendants have entered?] Not that all the shares should be allotted, but that they would not by any voluntary act of theirs prevent their allotment.

\*740] \*ERLE, C. J.—The plaintiff in this action claims to recover the sum of 400*l.* due to him under a contract entered into with him by the defendants by resolution of the board of directors, under which he was to receive 100*l.* down, and 400*l.* more when the whole of the shares in the proposed company should be allotted. It is conceded that the whole of the shares never were allotted, so that, taking the contract in its literal terms, the 400*l.* never became payable. But *Planché v. Colburn*, 8 Bing. 14 (E. C. L. R. vol. 21), 1 M. & Scott 51, decides that a party who has come under such a liability cannot prevent its attaching by any wilful act of his own. And I am of opinion that the defendants by their own act in winding up this company did prevent the rest of the shares being allotted, and so prevented the plaintiff from becoming entitled to the 400*l.* by the terms of his contract. The only question, therefore, which remains to be considered, is, what damages the plaintiff is entitled to recover. By the universal rule, the plaintiff is entitled to recover what he has lost by the wrongful act of the defendants. The defendants, after some discussion, thought it prudent to wind up the company, because the vendor of the estates upon the acquisition of which the company's existence was to depend, repudiated the contract which had been made by his agent, and the company could only enforce its performance by a probably protracted litigation. If the company had entered upon that course, the probable consequence would have been that no person would have ventured to buy the shares, and then the plaintiff would have got nothing. On the other hand, a threat of proceedings possibly might have induced the vendor to give way, and in that event the plaintiff might have earned the 400*l.* He has, however, by the acts of the defendants, lost his chance of obtaining the \*741] 400*l.* Both parties appear to have acted with perfect good faith; but, at the same time, the directors knew of the refusal of Mr. Lascelles to perform the contract in the early part of 1863, but went on trying to make the best bargain they could, without communicating the difficulty to the plaintiff, who only learned it by accident in the month of May. Under all the circumstances, therefore, making the best estimate we can, we think the plaintiff's compensation for the breach of contract should be assessed at 250*l.*

WILLES, J.—I am of the same opinion. One who enters into a contract is bound to perform his engagement in substance. This is illustrated by the case in *Bulstrode*, where the defendant contracted to deliver to the plaintiff a horse, but poisoned him before delivery. That was held not to be a substantial performance of the contract, because one of the contracting parties had done an act which prevented the other from having the benefit of it. I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it. This is a clear proposition of good sense as well as law. Applying it to this case,—the company undertake to pay the plaintiff 400*l.* on the whole number of the shares being allotted,—nothing, of course, being done by them to prevent the allotment. The directors expected that the whole number would be subscribed for, and so the plaintiff would earn the stipulated sum. The plaintiff also must have contemplated that the whole would be disposed of. In February, 1868, intelligence was received by the directors that Mr. Lascelles, the proprietor of the estates which they had contracted to buy, declined to fulfil the engagement his agent had entered \*into. The directors should then at once have called upon the plaintiff and arranged with [\*742 him. It is very probable that persons who otherwise might have been willing to take shares would decline to embark in a company which could only start with litigation with an unwilling vendor: and probably the plaintiff would then have estimated his chance of getting the 400*l.* at less than he did before. The directors, being unwilling to go to law, preferred winding up the company and returning the deposits,—thus rendering impossible what before was possible, viz. that the whole number of shares might have been subscribed and the 400*l.* earned by the plaintiff. The result is that the plaintiff is entitled to receive the 400*l.*, less an allowance for the risk. It is extremely difficult to say what sum should represent that risk: but, upon the whole, I am disposed to agree with the rest of the court that 250*l.* will be a reasonable compensation.

BYLES, J.—I am of the same opinion. In the course of the argument, I asked Mr. Prentice what he conceived to be the obligation into which the defendants had entered. The answer he gave me was, that it was not that all the shares should be allotted, but that they would voluntarily do no act which should prevent the attainment of that result. Now, the impossibility of all the shares being allotted arose from the winding up of the concern by the directors,—in a very unusual way, certainly, for they returned to the allottees the deposits in full, with 8 per cent. interest. All that we can see, is, that the winding up was the act of the defendants. With their motives, we have nothing to do. Be their reasons good or bad, the plaintiff is entitled to a verdict. They have broken their contract, and the plaintiff must be compensated for it. As to what that compensation should be, I will only say, that, \*in the uncertainty in which we find [\*743 ourselves, all we can say is, that the damages should be more than nominal and (perhaps) less than the 400*l.* Considering all the circumstances, acting as a jury, we think we do right in saying that the proper measure is 250*l.*

**KEATING, J.**—I am of the same opinion. The case is doubtless a peculiar one. The plaintiff has not done what he contracted to do. That is conceded. But it is said that it was by the act of the defendants that he was prevented from doing it. In one sense it certainly was. But it is impossible not to see that the doing that act was not wrongful or voluntary on the part of the defendants, but the result of the owner of the property refusing to ratify the contract made on his behalf by his agent. But for that, the plaintiff would have had a chance of earning the 400%. Under the power reserved to us by consent of the parties, we think the justice of the case will be met by awarding the plaintiff 250%,—each party paying their own costs of the rule.  
Rule accordingly.

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CAPEL v. POWELL and Another. Nov. 24.

One who has obtained a sentence of dissolution of marriage in the Divorce Court, is not liable to be joined in an action for a tort committed by his wife during the coverture.

**THIS** was an action for an assault and false imprisonment.

The declaration stated that the defendant Caroline Nickel, sued as Caroline Powell, at and during the time she was the wife of the defendant Ellison Powell, unlawfully gave the plaintiff into the custody of a policeman, on a false charge of felony, &c., &c.

The defendant Caroline Nickel pleaded,—first, not guilty,—secondly, a justification.

\*The other defendant pleaded that at the time of the commencement of the action the said Caroline Nickel was not his wife.  
\*744]

The plaintiff new-assigned that the trespasses complained of were committed by the said Caroline Nickel whilst she was the wife of the said Ellison Powell.

To this the defendant Ellison Powell pleaded, that, at the time of the commencement of the action, the said Caroline Nickel was not his wife. Issue thereon.

At the trial before Martin, B., at the last Summer Assizes at Kingston, the female defendant did not appear. It was proved on the part of the defendant Ellison Powell, that, at the time the transaction complained of took place, Caroline Nickel and himself were living apart by mutual consent, and that, before the commencement of the action, he had obtained a decree for dissolution of the marriage under the 20 & 21 Vict. c. 85.

The learned judge was of opinion that the plea was an answer to the action; and he desired the jury to assess the damages against the female defendant, reserving leave to the plaintiff to move to enter the verdict against the other defendant, if the court should be of a contrary opinion.

*Daly*, on a former day in this term, obtained a rule calling upon the defendant Ellison Powell to show cause why judgment should not be entered against him for 50%. non obstante veredicto, on the ground that the husband's liability for the tortious act of the wife during coverture is not discharged by a decree dissolving the marriage on

the ground of adultery. He referred to the 25th and 26th sections of the 20 & 21 Vict. c. 85.(a)

\**Hawkins, Q. C.*, and *Sir G. Honyman*, now showed cause.— [745 This action is not maintainable against the male defendant. In all cases where the husband is sued with his wife in respect of contracts made by her or torts committed by her before the marriage, he is merely joined for conformity: if he dies before judgment, the right of action survives as against the wife. In 1 Chitty on Pleading, edit. 1844, p. 104, it is said: "Actions for torts committed by a woman before her marriage must be brought against the husband and wife jointly: *Bac. Abr. Baron and Feme* (L); *Co. Litt.* 851 b; *Com. Dig. Baron and Feme* (Y). For \*torts committed by the wife [746 during coverture, as, for slander, assaults, &c., or for any forfeiture under a penal statute, they must also be jointly sued: 1 Hawk. P. C. 3, 4; *Bac. Abr. Baron and Feme* (L). A person may sue husband and wife jointly for her libel or slander, although she may have committed adultery, and they live separate, but have not been divorced à vinculo matrimonii; *Head v. Briscoe*, 5 C. & P. 484 (*E. O. L. R.* vol. 24). In an action of trespass against husband and wife for her tort before coverture, or a wrong committed by her alone during the coverture, if she die before judgment, the suit will abate; but, if the husband die or become bankrupt, her liability will continue: *Middleton v. Croft*, *Rep. temp. Hardw.* 395, 399." The husband cannot after her death be sued for a tort committed by the wife. A divorce à vinculo matrimonii is for this purpose the same as death. The relation of husband and wife has in that case ceased to all intents and purposes. The 25th and 26th sections of the 20 & 21 Vict. c. 85 have been relied on to show that protection was only intended to be given to the husband quoad by-gone transactions in the case of a judicial separation. But the answer to that is obvious: it was necessary to make such a provision in the case of a judicial separation, because the relation of husband and wife still subsists, though the marital obligations are suspended: but no such provision could be needed where the marriage is altogether dissolved. In *Head v. Briscoe*, *Tindal, C. J.*, says: "There is no doubt in point of law that a husband, so long as the relation of husband and wife continues, is answerable to a third person for what is done by the wife. And, whether

(a) The 25th section enacts, that, "in every case of a judicial separation, the wife shall from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire, or which may come to or devolve upon her: and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead: provided, that, if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

And s. 26 enacts, that, "in every case of judicial separation, the wife shall, while so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: provided, that, where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied to her use: provided also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband."

their separation be permanent or temporary, it does not affect the question, *unless it operates so upon the marriage as to make the civil relation cease*; for, by the law of England, you cannot bring an action \*747] against the wife without joining the husband; and a man would be without remedy if he could not sue the husband." Here, the plaintiff is not without remedy. There is no impediment in the way of his suing the wife, who is to all intents and purposes a single woman. *Head v. Briscoe* came before the full court (2 Law J., N. S., C. P. 101), when the ruling of Tindal, C. J., was sustained. This probably was the reason why the provisions contained in the 25th and 26th sections were inserted in the Divorce Act.

*Daly and Houston*, in support of the rule.—The husband is clearly liable for the tortious acts of his wife during coverture: *Bac. Abr. Baron and Feme* (L). A divorce à vinculo, or a sentence of dissolution of marriage, exonerates the husband from the consequences of acts done by the wife after sentence, but not before. Death of the wife dissolves the liability, upon the principle that *actio personalis moritur cum persona*. The death of the wife is the act of God. Divorce is the act of the party. [ERLE, C. J.—Marriage does not give a cause of action against the husband. Whilst the husband lives and the relation continues, he must be joined in all actions for his wife's debts and trespasses. If the husband dies, the action goes on against the wife. If the wife dies, the action abates,—because the husband is not liable.] Before the sentence of dissolution was pronounced here, the plaintiff had a vested right of action. [ERLE, C. J.—Against the wife, not against the husband. The separate existence of the wife is wholly ignored during coverture. In *Marshall v. Rutton*, 8 T. R. 545, 548, Lord Kenyon puts the state of widowhood and divorce à vinculo matrimonii in the same category. KEATING, J.—It is difficult to see any reason why the husband should be joined for \*748] conformity after the dissolution of the marriage.] When the case of *Head v. Briscoe* was decided, there were no means of dissolving a marriage but by an act of parliament.

ERLE, C. J.—I am of opinion that this rule should be discharged. I think the husband who has obtained a decree of dissolution of marriage is not liable to be sued for a wrong committed by the wife whilst the coverture existed. Upon this point the law seems to me to be perfectly clear. During coverture the wife has no such existence as to enable her to be a suitor in her own right in any court; neither can she be sued alone. For any wrong committed by her she is liable, and her husband cannot be sued without her; neither can she be sued without joining her husband. Seeing that all her personal property is vested in the husband, it would be idle to sue the wife alone: the action would be fruitless. Where the husband is joined for conformity, if he dies, the action goes on against the wife: but, if the wife dies, the action abates. It is clear to demonstration, therefore, that there is no cause of action against the husband. He is not liable for the wrong; but he is joined only by reason of the universal rule that the wife during coverture cannot be either a sole plaintiff or a sole defendant. The reason does not apply where there has been a divorce à vinculo matrimonii. The woman is then no longer under coverture. She is remitted to her former name and

station, and is perfectly capable of suing and being sued, as if she never had been married: consequently, the necessity for joining the husband no longer exists. One can well recognise the expediency of making a legislative provision for the case of a decree of judicial separation; for, there, notwithstanding the sentence, the relation of husband and wife is not entirely dissolved. But there was no need of \*legislation in the case of a sentence which dissolves the marriage. *Head v. Briscoe*, 5 O. & P. 484, is a distinct deci- [\*749 sion of a very learned judge to that effect. By a divorce à vinculo, or a sentence of dissolution, the husband is altogether exonerated from the responsibilities which the marriage entailed upon him.

KEATING, J.—I am entirely of the same opinion. The moment it is established that the sole liability of the husband in respect of wrongs committed by the wife, is, to be joined for conformity in the action against her, it follows as a necessary consequence that the dissolution of the relation of husband and wife, by putting, an end to the state of things which caused the necessity for joining him, discharges him from that liability. Rule discharged.

#### HORWOOD v. WOOD and Others. Nov. 15.

A claim for a balance due as the result of cross-consignments and remittances between a merchant here and a merchant (a British subject) domiciled and carrying on business exclusively at the Cape of Good Hope, is "a cause of action which arose within the jurisdiction" of the superior courts at Westminster, or "in respect of the breach of a contract made within the jurisdiction," within the 18th section of the Common Law Procedure Act, 1852.

THE defendants, who were merchants carrying on business at Graham's Town, in the colony of the Cape of Good Hope, under the firm of George Wood & Sons, having no establishment and no property in this country, had considerable dealings with a firm of Frederick Joly & Co., merchants in London, down to the month of February, 1853, when Mr. Joly died. On the 28d of that month, information of that event was communicated to Messrs. Wood & Sons by the \*now plaintiff, in a letter of which the following is a [\*750 copy:—

"London, 28d February, 1853.

"Messrs. G. Wood & Sons, Graham's Town.

"Gentlemen,—I am much grieved in having to communicate to you the sad intelligence of the decease of my very beloved and respected friend and principal, Mr. Frederick Joly, who expired on the 14th instant. With this gentleman I commenced my commercial life in the year 1820: and, having enjoyed his unlimited confidence up to the period of his death, and having also had the principal conduct of his business, I beg to solicit a continuance of the same confidence on my own behalf as hitherto experienced by him, and to assure you that no exertion of mine shall be wanting to give satisfaction in any transaction with which I may be intrusted. It is my intention to carry on the business as heretofore under the firm of Frederick Joly & Co.  
"M. HORWOOD."

On the 12th of March, 1853, the following letter was addressed to



G. Wood & Sons by "M. Horwood and P. Champion, executors of the late Frederick Joly :"—

"In consequence of the lamented death of our mutual friend Mr. Frederick Joly, which took place on the 14th ultimo, we herewith enclose your account current balanced up to that date, and leaving to your debit a balance of 3510*l.* 9*s.*; and, as we are desirous to liquidate his estate at an early period, we shall be obliged to you to remit said balance to our account to Messrs. Frederick Joly & Co., whose circular is enclosed."

At the foot of the above was the following, signed by the plaintiff:—

"Gentlemen,—If you so approve, please order us to pay over to the executors of the late Frederick Joly the balance of your account as above, viz., 3510*l.* 9*s.*, to your debit in account with us."

\*751] \*On the 26th of April, Wood & Co. wrote assenting to this proposal, whereupon the plaintiff, "for self and P. Champion, executors," on the 14th of July, addressed a letter to them, as follows:—

"Gentlemen,—We are in receipt of your favour of the 26th of April, and now beg to acknowledge the settlement of your account with the late Frederick Joly by Messrs. Frederick Joly & Co., who have taken over the balance of your account current to 14th February last, say 3510*l.* 9*s.*, to your debit, and will have passed to your credit all remittances received since."

The Messrs. Wood continued their dealings with the plaintiff under the new firm down to June, 1864, when the plaintiff, claiming a balance of 2908*l.* 10*s.* as being due to him as the result of the cross-consignments and remittances between them, on the 23d of that month issued a writ of summons against them under the 18th section \*752] of the Common Law Procedure Act, 1852,(a) \*requiring him to appear thereto within one hundred and ten days, and claiming that sum with 5 per cent. interest, and 10*l.* 10*s.* for costs, within one hundred and ten days from the service thereof.

*Watkin Williams* now moved for a rule calling upon the plaintiff to show cause why the writ should not be set aside, on the ground that the above facts (which appeared on affidavit) did not disclose "a

(a) Which enacts, that, "in case any defendant, being a British subject, is residing out of the jurisdiction of the superior courts of common law at Westminster, in any place except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form contained in Sched. A. No. 2, which writ shall bear the endorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior courts; and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is a *cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction*, and that the writ was personally served upon the defendant, or that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case: Provided always that the plaintiff shall and he is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry, or before one of the Masters of the said superior courts in the manner thereafter (s. 94) provided, according to the nature of the case, or as such court or judge shall direct: and the making such proof shall be a condition precedent to his obtaining judgment."

cause of action which arose within the jurisdiction" of this court, or "in respect of the breach of a contract made within the jurisdiction," within the statute. He submitted, that, to entitle a plaintiff to proceed under this section, it is necessary that the *whole* of the cause of action should have arisen within the jurisdiction of the court; referring to *Sichel v. Borch*, 2 Hurlst. & Colt. 954. There, the defendant, a merchant residing in Norway, and not being a British subject, drew, endorsed, and sent in a letter by post to a merchant in London a bill of exchange payable in London, and which was endorsed to the plaintiff, and dishonoured: and it was held (by Pollock, C. B., and Martin, B., dubitante Pigott, B.) that there was no cause of action which arose within the jurisdiction of the superior courts, nor a breach of a contract made within their \*jurisdiction, and consequently that the plaintiff could not proceed against the [\*753 defendant under the 19th section of the Common Law Procedure Act, 1852.(a) "The first question," said Martin, B., "is, does the cause of action arise within the jurisdiction? The 'cause of action' means the *whole* cause of action, and includes the drawing and endorsement of the name of the drawer on the bill, both of which took place in Norway. Therefore the whole cause of action did not arise within the jurisdiction. Then, was there a breach of a contract made within the jurisdiction? The contract was not made within the jurisdiction, but, on the contrary, in Norway; and, having been made there, a breach of it here is not within the operation of this act of parliament. Therefore it seems to me that this case is not within the language of the act, and it is certainly not within its spirit, for a foreigner can owe no allegiance to the law of England who did nothing more than enter into some mercantile transaction in respect of which he drew a bill abroad." [ERLE, C. J.—There, there was merely a request to pay money out of the jurisdiction. There is a material \*distinction [\*754 between the liability of a foreign drawer or endorser and that of one who writes from abroad to a merchant in London, "Please you pay A. B. 3000*l.* for me."] How can it be said here that "the cause of action," that is, the *whole* cause of action, arose in this country? Part of it clearly arose at Graham's Town. The receipt of the letter in England makes no difference.

PER CURIAM.—We think there was a cause of action in this case which arose within our jurisdiction, and a breach of a contract made within the jurisdiction, and therefore that the writ was properly issued.  
Rule refused.

(a) Which enacts, that, "in any action against a person residing out of the jurisdiction of the said courts, and not being a British subject, the like proceedings may be taken as against a British subject resident out of the jurisdiction, save that, in lieu of the form of writ of summons in the schedule A. No. 2, the plaintiff shall issue a writ of summons according to the form contained in the said schedule A. No. 3, and shall in manner aforesaid serve a notice of such last-mentioned writ upon the defendant therein mentioned, which notice shall be in the form contained in the said schedule also marked No. 3; and such service shall be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad, and by leave of the court or a judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon."

## ELWOOD and Another v. CHRISTY and Others. Nov. 5.

It is no ground of objection to the title of an assignee of a patent, that the assignors, the executors of the grantee, had omitted to register the probate until after the date of the assignment; though possibly it might be an obstacle to the maintenance of an action by the assignee for an infringement, if commenced before the registration of the probate.

THIS was an action for the infringement of a patent for an improved hat or helmet for hot climates.

The cause was tried before Erle, C. J., at the sittings in London after the last Trinity Term, when a verdict was found for the plaintiffs.

*Bovill*, Q. C. (with whom was *Murray*), moved for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence, and also upon affidavits setting forth evidence of user in India long anterior to the date of the patent, which but for the absence of certain witnesses the defendants would have been able to prove. The misdirection complained of was in his Lordship ruling \*755] that the patent had been \*well assigned to the plaintiffs. It appeared that the plaintiffs claimed under an assignment made to them by the executors of one Henry Elwood. The testator died on the 20th of November, 1862. Probate of his will was obtained on the 3d of December. The assignment to the plaintiffs was made on the 5th of February, 1863: but the probate was not registered until the 10th of April. The 35th section of the 15 & 16 Vict. c. 88, enacts that "there shall be kept at the office appointed for filing specifications in Chancery under this act, a book or books intituled 'The Register of Proprietors,' wherein shall be entered, in such manner as the commissioners shall direct, the assignment of any letters-patent, or of any share or interest therein, any license under letters-patent, and the district to which such license relates, with the name or names of any person having any share or interest in such letters-patent or license, the date of his or their acquiring such letters-patent, share, and interest, and any other matter or thing relating to or affecting the proprietorship in such letters-patent or license: Provided always, that, until such entry shall have been made, the grantee or grantees of the letters-patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters-patent, and of all the licenses and privileges thereby given and granted." It was submitted, that, under these circumstances, as the name of the deceased would appear upon the register as the proprietor of the patent at the date of the assignment, the executors had not clothed themselves with a perfect title to convey it,—the object of the statute being that no person shall deal in any way with a patent until everything affecting the title to it has been registered; and that, as in the case of an intestacy of the grantee of the patent, the grant of letters of administration must \*756] be registered before the \*representative can deal with the patent, and in the case of bankruptcy the appointment of assignees must be registered, so in this case there could be no valid dealing with the patent by the executors until they had registered the probate.

ERLE, C. J.—There is nothing whatever in this point. If the plaintiffs had commenced their action before they had completed their

title by registering the probate, the case would probably have been different.

The rest of the Court concurring, the rule was granted only upon the ground that the verdict was against the weight of evidence, and upon the affidavits. It was, however, subsequently discharged.

### WHITELEY v. KING and Others. Nov. 5.

Where a will and codicil (the drafts of which were produced) were proved to have been left by the attorney who drew them with the testator after execution, but were not forthcoming after his death,—declarations of the testator to various members of his family down to a few days before his death, expressive of his satisfaction at having settled his affairs, and intimating that his will was left with his attorney, were held to have been properly admitted, to rebut the presumption that the will and codicil had been destroyed by the testator *animo revocandi*.

THIS was an action of ejectment brought by the plaintiff, the grandson and heir-at-law of one John Whiteley, to recover certain lands in the county of York, which were claimed by the defendants as devisees under a will made by John Whiteley on the 6th of December, 1859, and a codicil dated the 17th of December, 1861.

The will, which revoked all former wills, was not to be found at the death of the testator; but a draft was produced by one Sutcliffe, the attorney who prepared \*it, and in whose custody it had [\*757 remained down to December, 1861.

The cause was tried before Blackburn, J., at the last Summer Assizes at Leeds. It appeared that, at that time, the testator was desirous of making some alteration in his will, and wrote to Sutcliffe requesting him to let him have the will, and giving him instructions for a codicil thereto; that Sutcliffe accordingly went to him with the will and codicil; that the testator executed the codicil; that Sutcliffe was requested, either by the testator or by one of his daughters who was present to leave them with the testator; that he did so; and that he saw no more of them: nor did it appear that they had ever been seen by any one since. The testator died in 1863.

In order to rebut the presumption arising from the absence of the will and codicil, that the testator had destroyed them, evidence was offered on the part of the defendants, of repeated declarations made by the testator to different members of his family, down to a short period before his death, expressing his satisfaction at having settled his affairs, and telling one person that he had named him one of his executors, and another that his will was at Sutcliffe's.

This evidence was objected to on the part of the plaintiff, but admitted by the learned judge on the authority of *Patten v. Poulton*, 1 Swab. & Trist. 55, 27 Law J., Probate 41, where it was held by Sir C. Cresswell that the presumption that a will left in the keeping of the testator, if it cannot be found at his death, has been destroyed by him *animo revocandi*, is a presumption of fact which prevails only in the absence of circumstances to rebut it; and that among such circumstances are declarations by the testator of goodwill towards the persons benefited by it, adherence to the will, as made, and the contents of the will

\*758] itself: and he left \*it to the jury to say whether or not the testator had destroyed the will and codicil *animo revocandi*.

The jury found that the will had not been revoked, and accordingly the verdict was entered for the defendants.

*Kemplay* now moved for a new trial on the ground that the declarations of the testator were not admissible.—In *Taylor on Evidence*, 4th edit. 164, § 135, it is said,—“If a will, traced to the possession of the testator, and last seen in his custody, be not forthcoming on his death, the law presumes that it has been destroyed by himself; and this presumption, which is obviously founded on good sense, must prevail, unless there be sufficient evidence to rebut it,”—citing *Welch v. Phillips*, 1 Moore P. C. 299, 302, per Parke, B.; *Dickinson v. Stidolph*, 11 C. B. N. S. 341, 357 (E. C. L. R. vol. 103); *Brown v. Brown*, 8 Ellis & B. 876 (E. C. L. R. vol. 92); In re *Brown*, 27 Law J., Probate 20, 1 Swab. & Trist. 32; *Cutto v. Gilbert*, 9 Moore P. C. 143, per Dr. Lushington; *Saunders v. Saunders*, 6 Eccl. & Mar. Cas. 518; *Williams v. Jones*, 7 Eccl. & Mar. Cas. 106; *Patten v. Poulton*, 1 Swab. & Tr. 55. In *Brown v. Brown*, 8 Ellis & B. 876, A. executed a will, and afterwards executed a second will, which he took away with him. On his death, the earlier will was found, but the second will could not be found. The solicitor who prepared the second will gave evidence (from recollection) of its contents, which were inconsistent with the first will, and revoked it. On a case where the court had power to draw inferences of fact, it was held, that secondary evidence of the contents of the last will was admissible, and that the evidence given sufficiently showed that it had revoked the first will; and, further, that the facts that the second will was last seen in the custody of the deceased, and could not be \*759] found, raised a \*presumption that he had destroyed it *animo cancellandi*, and cast upon those seeking to establish the will the onus of rebutting that presumption. That case fully bears out the proposition stated by Mr. Taylor. [KEATING, J.—*Brown v. Brown* is criticised by Sir James Wilde in *Wharram v. Wharram*, 33 Law J., Probate 75.] The criticism of that learned judge does not bear upon the point now under consideration. That the missing will was intentionally destroyed is a presumption of fact which it requires strong evidence to rebut. [ERLE, C. J.—Surely you may look at a man's words to see what his intentions are. The question here was whether the testator had the intention to destroy his will and codicil. Down to the last moment almost of his life he is found declaring his satisfaction that he has settled his affairs.] Declarations accompanying an act, no doubt, are admissible. But mere loose conversations deposed to by interested persons ought not to outweigh the presumption arising from the absence of the document.

ERLE, C. J.—I am of opinion that there should be no rule in this case. The non-appearance of the will and codicil raising a presumption of fact that the testator intended to revoke them, evidence tending to prove the contrary intention was admissible. For this purpose the ordinary channels of information may be resorted to. The declarations of the testator are cogent evidence of his intentions. In this case his repeated declarations down to within a very few days of his death, were abundant evidence that the testator did not intend

to cancel or destroy the will. He on several occasions expressed his satisfaction that he had "settled his affairs," and on one occasion said that he had left his will with Mr. Sutcliffe. If declarations are evidence of intention,—as the cases cited show \*they are,—there [760] was abundant evidence to satisfy the jury here that the testator had no intention to cancel or revoke the will and codicil, and consequently the verdict was properly found for the defendants.

BYLES, J.—I am of the same opinion. I see no reason why the declarations of the testator should not be admitted as part of his conduct, to show his intentions as to the disposition of his property.

KEATING, J.—I am of the same opinion. I think it would be wrong to cast a doubt upon a well-established rule of law by granting a rule. Rule refused.

#### MOON v. HALL. Nov. 4.

After the issuing of a writ, the attorney gave the plaintiff the following memorandum,—“I undertake to carry on this action on having cash provided for costs out of pocket, such costs not to exceed 15*l.*, including counsel's fee; not any witnesses' expenses :”—Held, that this was an engagement on the part of the attorney not in any event to charge the client more than 15*l.*

THIS was an action upon an attorney's bill. The cause was tried before Williams, J., at the sittings in London after last Easter Term. The plaintiff's version of the facts was as follows:—A person named Hicks had induced the defendant to give credit to one Cooper, who gave him a bill, which was dishonoured. Hicks thereupon went to Moon, and instructed him to issue a writ against Cooper in Hall's name. This was done, and Cooper obtained leave to defend the action. Hall's wife, having learnt that an action was pending, went with Hicks to Moon, when the latter told her that he would proceed with the action, and trust to getting his costs from Cooper, provided she would pay him the \*costs out of pocket, which would be about 15*l.* Ultimately Moon gave Mrs. Hall the following [761] memorandum:—

“Hall v. Cooper.

“I undertake to carry on this action, on having the cash provided for costs out of pocket, such costs not to exceed 15*l.*, including counsel's fee; not any witnesses' expenses. “FRANCIS MOON.”

The 15*l.* were paid to Moon, and the action against Cooper proceeded to judgment and execution. Cooper proposed a composition of 10*s.* in the pound, but was taken in execution at the suit of Hall. Cooper while in custody offered terms to Hall, which the latter declined to accept. Hall afterwards called at Moon's office, where he left the following note:—

“I were here at half-past ten until eleven. My terms is, to return me the 15*l.* paid to you, and the 10*s.* in the pound on the amount of the bill, and Cooper to pay your costs. “J. HALL.”

“F. Moon, Esq.”

In the meantime Moon had sent in his bill of costs to Hall, amounting to 61*l.* 10*s.* 2*d.*, after giving credit for the 15*l.* On the 4th of January, 1864, Hall wrote to Moon, as follows:—

“Sir,—I have received a notice from the Bankruptcy Court respect-

ing Cooper. As I have not the means of paying any further costs in the matter, please take no more steps on my account.

"F. Moon, Esq.

"J. HALL."

Mr. Moon's account of the interview with Mrs. Hall was, that, Hall being a stranger to him, and knowing Cooper to be in bad circumstances, he declined to carry on the action unless supplied with money for expenses out of pocket, and that the 15*l.* were paid on that account.

\*762] "On the part of the defendant, it was submitted, that, the 15*l.* once paid, all liability on the part of Hall to Moon in respect of the costs of the action was to cease; and that, at all events, the document was so ambiguous that evidence was admissible to explain it.

The learned judge left it to the jury to say whether they believed Mrs. Hall's version of what passed at the interview with Mr. Moon, or that given by that gentleman. The jury were of opinion that the evidence of Mrs. Hall disclosed the real agreement: and the learned judge, thinking that was the fair result of the document and of the evidence, directed a verdict to be entered for the defendant,—leave being reserved to the plaintiff to move to enter a verdict for him for the full amount, or for such sum as the Master on taxation should find due.

*Digby Seymour*, Q. C., in Trinity Term last, accordingly obtained a rule nisi, on the grounds,—first, that the plaintiff's undertaking did not limit his right to recover his costs to the amount mentioned in that undertaking,—secondly, that the construction was for the court, but, if it was matter for the jury, the evidence supported the construction put upon the undertaking and documents by the plaintiff,—thirdly, that the undertaking did not apply to the costs incurred before the date of the undertaking or subsequently to the verdict.

*Hardinge Giffard* and *Besley* now showed cause.—The fair construction of the document signed by Moon supports the view taken by the jury, and corroborates Mrs. Hall's evidence. Carrying on a cause for "costs out of pocket," is a well-known thing. And that was the obvious meaning of the plaintiff's undertaking, limiting it to 15*l.*

\*763] Taking that document and the \*contemporaneous conversation together, all that the plaintiff stipulated for was, the liability of Cooper plus the 15*l.* The subsequent documents, if they can be looked at for the purpose of explaining the first, are not at all inconsistent with that view of it.

*Digby Seymour*, Q. C., and *Joyce*, in support of the rule.—Some expenses had been incurred by Moon prior to this undertaking being given: and, knowing the circumstances of the parties, he might well decline to go on without being furnished with a sufficient sum to cover necessary disbursements. The document in question amounts to no more than an engagement on his part that he will carry on the action without requiring a larger advance than 15*l.*: he does not undertake that he will charge nothing for his labour.

ERLE, C. J.—I think the fair meaning of the document signed by the plaintiff, is, that Hall was not to be liable beyond the 15*l.* agreed to be paid. It fixes that as the maximum, and also that Moon shall carry on the action on being paid by Hall his costs out of pocket. That seems to me to be a reasonable contract for Hall to have entered

into; and it also seems to be very reasonable that Moon should consent to it, if he had any hope of making Cooper pay. It is by no means an uncommon bargain for an attorney to make. The surrounding circumstances at the time appear to me to confirm that view: and the jury found that the statement Mrs. Hall made as to what passed between her and Moon was true. The writ seems to have been issued against Cooper at the request of Hicks. There was no ratification of that as having been done for Hall until the interview with Mrs. Hall. It clearly was not intended to leave an outstanding claim for that writ. The subsequent events are not admissible as direct \*evidence [\*764 to guide the construction of the defendant's undertaking, though they might be admissible to show which party was the more entitled to credit: and I think they all tend to confirm Mrs. Hall, and to show, that, on payment of the 15*l*., Hall was to be exonerated from any further claim on the part of Moon.

BYLES, J.—I am of the same opinion. The proper mode of construing this undertaking, is, to ascribe to it the meaning which Moon understood that the other party would understand it to mean. Now, what could Moon imagine that Mrs. Hall would understand by this document? It is said that the undertaking does not cover the costs which had already been incurred, or extend to costs incurred after the verdict was obtained. But the expression "carry on this action" was necessarily used. The action had been brought. It means carry it on from the beginning to the end. Lord Coke says that the attorney's authority continues down to execution, if it be issued within a year. I cannot conceive that the jury could possibly have come to any other conclusion. The defendant's letter of the 4th of January at first occasioned me some difficulty. But the "further costs" there evidently means costs of proceedings in the bankruptcy court.

KEATING, J.—I am entirely of the same opinion. The construction put upon the plaintiff's undertaking by my Lord and my Brother Byles is evidently the correct one. And, even if its terms were open to the criticism of the plaintiff's counsel, it is impossible to suppose for a moment that the defendant could have understood it in any other sense than that he was to be exonerated from all costs of the action for the 15*l*. paid. I think it was a perfectly just verdict.

Rule discharged.

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**\*THE GENERAL DISCOUNT COMPANY (LIMITED) v. STOKES.** *Nov. 25.* [\*765]

Bankruptcy and certificate are no bar to an action for a call in respect of shares held by the defendant in a joint-stock company registered under the Joint Stock Companies Acts of 1856 and 1857, made after the adjudication,—the liability in respect of such call not being a liability at the time of the filing of the petition "to pay money on a contingency," within the 178th section of the Bankrupt Law Consolidation Act, 1849.

THIS was an action for calls by a joint-stock company. The defendant pleaded, that, before the commencement of the action, he became a bankrupt within the meaning of the statutes in force concerning bankrupts, and that the causes of action in the declaration mentioned accrued before the defendant so became bankrupt. Issue thereon.



The cause was tried before Byles, J., at the sittings in London after last Trinity Term. It appeared that the defendant was the holder of twenty shares of 10*l.* each, upon which 2*l.* 10*s.* per share had been paid, in The General Discount Company,—a company incorporated in September, 1857, under the Joint Stock Companies Acts of 1856 and 1857 (19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14); that, on the 3d of November, 1860, the defendant was adjudged a bankrupt, and obtained his certificate on the 4th of February, 1862; that, on the 14th of May, 1861, an order was made for winding up the company; and that, on the 4th July, 1861, a call was made by the official liquidator, the defendant's proportion whereof (110*l.*) had not been paid.

On the part of the defendant, it was submitted that the claim was one from which he was discharged by his certificate, by force of the 178th section of the Bankrupt Law Consolidation Act, 1849, which enacted, that, "if any trader who shall become bankrupt after the commencement of this act shall have contracted before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of \*766] such petition, \*in every such case, if such liability be not provable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the court shall think fit; and, after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends; provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed."

The learned judge directed a verdict to be entered for the plaintiffs for the amount claimed, reserving leave to the defendant to move to enter a verdict for him if the court should be of opinion that his bankruptcy and certificate were a bar to the action.

*Archibald*, on a former day in this term, obtained a rule nisi accordingly.—He submitted that the effect of the order of discharge, under the 161st section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134) was, to discharge the bankrupt "from all debts, claims, or demands provable under his bankruptcy;" and that the demand in question was provable under the 178th section of the 12 & 13 Vict. c. 106, as a debt payable upon a contingency: and he referred to *Adkins v. Farrington*, 5 Hurlst. & N. 586. There, in May, 1857, the plaintiff and defendant, jointly with and as sureties for one Vigrass, made their promissory note (joint and several) in favour of one Haywood, for timber supplied by Haywood to Vigrass. The note was payable on the 1st of January, 1858. In November, 1857, Vigrass executed an \*767] assignment for the benefit of his \*creditors, under which the plaintiff ultimately received a dividend. In December, 1857, the defendant became bankrupt, and obtained his certificate. In January, 1858, the plaintiff paid the note, and afterwards commenced an action against the defendant, his co-surety, to recover contribution:

and it was held, that, inasmuch as the payment by the plaintiff was within six months from the time of the filing of the petition by the defendant, the plaintiff had a right not merely to *claim* but to prove against the estate of the defendant, in respect of his liability to contribution, as "a liability to pay money on a contingency," within the 178th section of the Bankrupt Law Consolidation Act 1849, and consequently that the bankruptcy and certificate of the defendant were an answer to the action.

*Kemp* now showed cause.—The claim in question was neither a contingent debt within the 177th section, nor a contingent liability within the 178th section of the 12 & 13 Vict. c. 106. In *The South Staffordshire Railway Company v. Burnside*, 5 Exch. 129, calls upon shares in a railway company were held not to be provable under the 51st or 56th sections of the 6 G. 4, c. 16. "If," said Parke, B., "the defendant contracted with the company to take twenty shares upon each of which the capital to be contributed was 20*l.*, he may be said to have agreed with them to pay 20*l.* per share by such instalments as according to the statute they were entitled to require. If he purchased the shares from another, he may be considered as having taken upon himself the contract of the vendor to the like effect. But, under this section (the 51st), which is taken from the 7 G. 1, c. 31, s. 1, a debt under such a contract could not be proved. It was uncertain how much of the 20*l.* per share the exigencies of the company would call for: nor could it be told what the time of payment would be, and consequently what the amount to be rebated. Is this, [\*768 then, a debt payable on a *contingency* under the 56th section? The contract on which the shareholder's obligation is founded, is not to pay a certain fixed sum upon a future contingency, but such sum or sums as may be required from himself and all the other shareholders from time to time, not exceeding a certain sum, and regulated by the wants of the company. At the time of the bankruptcy, it was uncertain what the sum would be which the defendant would be called on to pay, and no certain debt was then contracted. But, in order to bring a case within the 56th section, the bankrupt must have contracted a certain *debt* before the bankruptcy, payable after it on a contingency." In *Hopkins v. Thomas*, 7 C. B. N. S. 117 (E. C. L. R. vol. 97), it was held that bankruptcy during the currency of a quarter (and subsequent certificate) is no bar to an action by a schoolmaster for board and tuition of the defendant's son under a quarterly contract,—the demand not being a *debt* "not payable at the time of the bankruptcy," within s. 172 of the 12 & 13 Vict. c. 106, or "a liability to pay money upon a contingency," within s. 178. "There was no debt," said Erle, C. J., "payable in future, or on a contingency, at the time of the defendant's bankruptcy: and we are of opinion that there was no liability within the meaning of the 178th section, though there was a contract to pay if the contract was continued until that day." [BYLES, J.—What sort of cases do you suggest come within the 178th section?] Contracts of guarantee and the like. The contingency must be one that can be reduced to a certainty.

*Archibald*, in support of his rule.—The case, it is submitted, falls within the language of the 178th section of the 12 & 13 Vict. c. 106.

\*769] The subsequent \*legislation on this subject, contained in the 153d (a) and 154th (b) sections of the 24 & 25 Vict. c. 134, shows that this section ought to receive the most liberal construction. These clauses were introduced in order to get rid of the difficulty raised by the cases of *Warburg v. Tucker*, 5 Ellis & B. 384 (E. C. L. R. vol. 85), in error, *Ellis, E. & B. 914* (E. C. L. R. vol. 96), and *Young v. Winter*, 16 C. B. 401 (E. C. L. R. vol. 81). This is a limited company registered under the Joint Stock Companies Acts, 1856 and 1857. There is no evidence as to what the company's articles were; therefore it must be taken that they were according to the form given in the 9th section of the 19 & 20 Vict. c. 47, Table B. Under these, retaining the shares is contracting a liability to contribute to the assets of the company to the extent of the nominal value of the shares; and by s. 22 of that act, the amount of calls for the time being unpaid on any share is to be deemed to be a debt due from the holder of such share to the company. The 75th section of the 25 & 26 Vict. c. 89, brings calls within the 177th section of the 12 & 13 Vict. c. 106. It enacts, that "the liability of any person to contribute to the assets of a company under this act, in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability; and it shall be lawful, in the case of the bankruptcy of any contributory, to prove against his estate the estimated value of his liability to future calls, as well as calls already made." [BYLES, J.—

\*770] That statute does not \*apply to this case.] In *Ex parte Barwis*, *In re Strahan*, 25 Law J., Bankruptcy 11, a joint and several covenant was entered into by a principal debtor and his surety that the principal would pay a sum of money by three instalments, with interest, on three specified days. The first instalment was duly paid, but, before the second instalment became payable, the surety became bankrupt. The creditor applied to the commissioner to be admitted to claim against the bankrupt's estate in respect of the amount of the two unpaid instalments and interest, and was allowed. The Lords Justices, on appeal, affirmed the decision of the commissioner, holding that the claim was properly admitted as upon a contingent liability under the 178th section of the 12 & 13 Vict. c. 106. The contingency there was, that the *principal* might not pay: the claim was under the bankruptcy of the surety. Lord Justice Turner, in giving judgment, says: "Up to the time of the passing of the Consolidation Act, the law had made no provision for a proof in respect of contingent liabilities, and the 178th section was introduced into the act for the purpose of enabling claims founded on such liabilities to be worked out. That shows that it was the intention of the legislature to exonerate bankrupts, as far as practicable, from such liabilities; and it is the duty of the court to endeavour to carry into effect the intention of the legislature. This claim was clearly a liability depending on a contingency, that is to say, the contingency whether the persons primarily liable would pay. It has been urged,

(a) Which makes demands in respect of unliquidated damages provable.

(b) Which provides for premiums on policies of insurance: see *Saunders v. Best*, ante, p. 731.

however, that it was not a contingent liability to pay a sum of money, but the covenant was one under which the bankrupts could have been obliged to pay if the other parties did not, and therefore this was in substance a covenant to pay a sum of money if certain other persons did not. Then it was said that the amount \*was uncertain, as the persons primarily liable might make some payments, so that it was uncertain what the deficiency would be. There was some truth in that observation: but here there was a measure of the liability. It could not exceed a certain sum; and the legislature seem to have intended to provide for such a case, by giving the commissioner a discretion as to the amount for which the claim should be entered." He goes on to say, that, as to the cases of *Young v. Winter* and *Warburg v. Tucker*, he did not see how they could be reconciled; and that, if it were necessary to decide between them, he should prefer following *Young v. Winter*. In *Boyd v. Robins*, 4 C. B. N. S. 749 (E. C. L. R. vol. 93), this court held that a liability as surety on a guarantee for the debt of another, which liability the party had the option of putting an end to by notice, was a contingent liability within the 178th section. The decision was overruled in the Exchequer Chamber (5 C. B. N. S. 597 (E. C. L. R. vol. 94)), on the ground that there the liability was contracted after the bankruptcy. [ERLE, C. J.—The ground of the decision here was, that, having taken the benefit by obtaining the goods for the principal debtor, the surety must take the liability.] *Parker v. Ince*, 4 Hurlst. & N. 53, is clearly distinguishable.(a) The contingencies there, as is said by \*Martin, B., are of a nature which could not possibly be susceptible of valuation. "The liability to pay money within that section," says that learned judge, "is, where a single sum of money is payable on a contingency, and in such case the court is to say for what sum the claim is to be made. The object is, to enable the creditor to be paid, in the event of the money becoming payable. Here, there is no contingency of that kind." The only contingency here is, the making of a call. [ERLE, C. J.—The case is equally within Baron Martin's principle. There may be ten calls.] There were as many contingencies in *Adkins v. Farrington* as here. The whole course of the legislation has been to free the bankrupt from all debts and liabilities down to the time of the petition. [KEATING, J.—Do you find any case where the liability has been held to be within

(a) By deed of separation between the defendant and his wife, the defendant covenanted with the plaintiff that he would every year during the joint lives of himself and his wife pay to the plaintiff, as a trustee for her, to her separate use, such sum as, together with the dividends or interest or other income to arise from 948*l.* 6*s.* 4*d.* Bank 3 per cent. Annuities, or from other funds settled or which might be settled to her separate use and which might be received by her, would make one clear annuity or yearly sum of 200*l.*, such annuity to commence from the 11th of January, 1854, and to be paid by four even and equal quarterly payments: provided that, if the defendant and his wife should at any time thereafter cohabit as man and wife, that then and from thenceforth the said annuity should cease. On the 29th of September, 1854, and while the defendant and his wife continued to live separate, the defendant became bankrupt: and it was held that the annual sum so covenanted to be paid by the defendant for the separate use of his wife, was not an "annuity" within the 175th section of the Bankrupt Law Consolidation Act, 1849, nor a "debt payable upon a contingency" within the 177th section, or a "liability to pay money upon a contingency" within the 178th section; and consequently that the certificate was no bar to an action for the recovery of a quarterly payment which became due after the bankruptcy.

the 178th section, in which anything more than the time of payment was contingent? Here, it was a contingency whether a call would be made.] In *Adkins v. Farrington*, the contingency was of that sort. [ERLE, C. J.—If the creditor does not get his money from the principal debtor, he will *certainly* call upon the surety. That is not \*773] a contingency.] In *Ex parte Barwis*, there was a \*contingency as to liability as well as time. The 18th section of the 20 & 21 Vict. c. 60 enacts that “all calls made or *to be made* on any shareholder or contributory in pursuance of any of the Joint Stock Companies Acts, shall, in the event of such shareholder or contributory becoming bankrupt or insolvent, be provable against his estate.” [ERLE, C. J.—That must mean calls made or to be made before the bankruptcy.(a)]

ERLE, C. J.—I am of opinion that this rule should be discharged. It is an action brought by a joint-stock company against a shareholder for a call. The call in question was made under the Winding-up Acts; but the principle is the same as if it were a call made by a continuing company. The defendant was adjudged a bankrupt on the 3d of November, 1860, an order was made for winding up the company on the 14th of May, 1861, and a call of 5*l.* 10*s.* per share was made upon the contributories on the 4th of July, 1861. The call therefore was made upon a shareholder who was a bankrupt: and the question is whether the certificate which was granted to him in February, 1862, constitutes a bar to the right of the company (or the official liquidator) to enforce payment of the call. The call, having been made after the bankruptcy, would not under ordinary circumstances be a debt provable against the estate: but the question turns upon the construction of the 178th section of the Bankrupt Act then in force (12 & 13 Vict. c. 106), which enables a party with whom the bankrupt has contracted a liability to pay money upon a contingency which shall not have happened, and the demand in respect whereof shall not have been ascertained before the filing of the petition, to claim for such sum as the court shall think fit. In other words, where \*774] the bankrupt has become \*liable to pay money upon a contingency which shall not have happened at the time of filing the petition, the party with whom such contingent liability has been contracted has the power of proving for its value, and so the bankrupt gets clear from the liability, inasmuch as his certificate is a bar to all claims and demands made provable against his estate. Then, was the liability of this shareholder to be called upon to contribute to the funds of the company, a liability to pay money upon a contingency within the meaning of this provision? On the first reading of the words of the 178th section, they would seem to raise a presumption that it was intended that the bankrupt should be discharged from such a liability as this: but, upon looking attentively at the authorities, I have come to the conclusion that the intention of the legislature to that effect, if such intention existed, has not been well expressed. Where a party is a holder of shares in a joint-stock company, his liability to pay money depends upon more contingencies than one: there may or may not be a call made; and the bankrupt might not be

(a) See *Betteley v. Stainsby*, 12 C. B. N. S. 477 (E. C. L. R. vol. 104).

the holder of the shares when a call is made. There may be no existing liability at the time of the bankruptcy; but a liability may arise from the concurrence of those two contingencies. The authority which induces me to come to this conclusion, is, the case of *Parker v. Ince*, 4 Hurlst. & N. 58, where the Court of Exchequer held that a liability to pay an annuity to a wife under a deed of separation, on the bankruptcy of the husband, was not a liability to pay money upon "a contingency" within the protection of the 178th section of the 12 & 13 Vict. c. 106, inasmuch as the liability depended upon several contingencies. In *Adkins v. Farrington*, 5 Hurlst. & N. 586, the plaintiff and defendant were both sureties for the purchaser of certain timber. The principal debtor failed before the \*bankruptcy [\*775 of the surety, and Adkins had to pay the whole amount. At the time he paid the money, it was a matter of perfect certainty that the deficiency must be paid by him, and he had a right to call upon his co-surety to repay him the moiety. There was but one sum and one contingency, and therefore the court held that it was provable. That is the ground upon which it is put by Bramwell, B. In *Ex parte Barwis*, In re Strahan, 25 Law J., Bankruptcy 10, money had been borrowed on mortgage, with a covenant by the debtor and Barwis the surety to repay the money, with interest, by instalments on certain specified days: the surety became bankrupt before all the instalments were due; and it was held that the creditor was entitled to prove in respect of that contingency against the estate of the surety. That is the strongest case in favour of Mr. Archibald's argument: but I think it does not go far enough to sustain it, because, in the case of a continuing company, if they were to come forward in the bankruptcy court and to say, that, from the state of their affairs, they expect that the shareholder will be called upon to pay the full amount, they would be exposing the weakness of the concern. It must be a claim depending upon whether or not the company is in a prosperous condition or not. Thus it will depend on a variety of contingencies, whereas the act of parliament seems to have contemplated but one contingency. It may be a hardship on the shareholder to be made to rest under this undefined liability. He, however, has his remedy by paying each call by a fresh bankruptcy. For these reasons, upon the best consideration I can bring to this very doubtful clause, I am of opinion that the defendant's certificate is no bar.

BYLES, J.—I am of the same opinion. Almost all \*the ques- [\*776 tions which present themselves under this act of parliament are fraught with difficulty. I was at first inclined to think that this case fell within the remedy of the 178th section: but the cases which have been referred to seem to go to this, that, where the liability to pay the money depends upon several contingencies, and not upon a single one, the words of the section are not satisfied. Here, there are two contingencies at the least,—one, whether a call would ever be made,—the other, whether, if a call were made, the bankrupt would at the time be the holder of the shares. If, therefore, any case could be imagined in which the existence of two contingencies would prevent its falling within the 178th section, this is that case. Further, if the bankrupt be discharged, he is discharged from all the liability that ever can happen in respect of these shares; and then we are

driven to this,—that the bankrupt will hold his shares (for, the assignees may not choose to interfere), and yet he is freed from all liability in respect of all calls past and future. On the other hand, if he be not discharged, the liability will stick to him in spite of his bankruptcy, only to be got rid of by a succession of appeals to the court. The balance of authority seems to coincide with the balance of convenience. The verdict, therefore, must stand.

KEATING, J.—I am of the same opinion. The construction of the 178th, like that of some other sections of this much considered act of parliament, is not free from difficulty. Upon the whole, however, upon the authorities referred to, and for the reasons given by my Lord and my Brother Byles, I concur with them in thinking that the rule should be discharged. Rule discharged.

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**\*777]**      **\*ROBINSON *v.* COLLINGWOOD.** *Nov. 8.*

1. A bill of sale was executed by A. to B., but the person who was really interested in the goods was C., who advanced the money, but whose name did not appear either in the bill of sale or in the affidavit filed therewith:—Held, that, though B. might be treated in equity as a mere trustee, there was no trust which need under ss. 2 and 3 of the Bills of Sale Act, 17 & 18 Vict. c. 36, appear upon the face of the instrument.

2. Where a bill of sale of goods taken under a *fi. fa.* is made by an officer of the sheriff, the court will presume that he was duly authorized to make it.

THIS was an issue under the Interpleader Act, to try the right to certain goods seized under a *fi. fa.* against a gentleman named Berkeley.

The issue came on to be tried before Williams, J., at the sittings in London after last Easter Term. The facts were as follows:—In August, 1861, a writ of *fi. fa.* was issued against the goods of Berkeley, upon a judgment obtained against him in an action at the suit of Collingwood. The sheriff of Middlesex having taken possession of the furniture and effects of Berkeley under the writ, Robinson, who was an attorney, and acting as such for one Montague, a friend of Berkeley, paid to one Hall, the sheriff's officer, 138*l.* 14*s.*, the amount of the condemnation-money, and took from him an assignment of the effects by bill of sale. In February, 1863, Berkeley, in consideration of a further advance of 32*l.*, assigned certain other effects to Robinson by another bill of sale. Both these sums were the moneys of Montague, and were advanced by Robinson as Montague's attorney; and the two bills of sale were duly registered under the 17 & 18 Vict. c. 36, but Montague's name did not appear either upon the instruments themselves or in the affidavits filed therewith.

Collingwood having brought a second action against Berkeley, and obtained judgment and issued execution, after the date of the second bill of sale, caused the goods which had been conveyed to Robinson under the two bills of sale (but which remained in Berkeley's possession) to be seized by the sheriff of Middlesex; and, Robinson claiming them, an interpleader summons was taken out, under which the  
**\*778]** present issue \*was directed, to try the validity of the title of Robinson under the bills of sale.

Hall, the officer who executed the first bill of sale, who was called as a witness, stated that the only authority under which he acted was a *verbal* appointment by the undersheriff.

On the part of the defendant it was objected that both bills of sale were invalid, the assignment to Robinson being subject to a trust which was not mentioned therein: and, as to the bill of sale of August, 1861, it was further objected that Hall, the officer who executed it, was not properly authorized so to do.

The learned judge directed the jury to find a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him, if the court should be of opinion that the bills of sale were invalid for the reasons assigned; but he overruled the objection as to the authority of the sheriff's officer to execute the first bill of sale.

*Keane, Q. C.*, in Trinity Term last, moved for a rule nisi to enter a verdict for the defendant, on the ground that the requisitions of the 2d section of the Bills of Sale Act, 17 & 18 Vict. c. 36, had not been complied with. He submitted that the true character of the transaction and the name of the person by whom the advance was made ought to have appeared upon the face of the bill of sale, in order that the execution-creditor, if he wished to pay off the mortgage, might ascertain to whom the money was to be paid.

He also moved for a new trial, on the ground of misdirection. He submitted that Hall, the officer who made the first bill of sale, had no authority to make it; for that, though the undersheriff has power to execute assignments in the name and under the seal of office of the sheriff,—*Doe d. James v. Brawn*, 5 B. & \*Ald. 248 (E. C. L. R. vol. 7),<sup>(a)</sup>—yet he could not delegate that power to another, [\*779 and at all events not by parol.

*ERLE, C. J.*—The rule may go upon the first point, but not upon the second. "When the sheriff appoints his undersheriff, he ex consequenti gives him authority to exercise all the ordinary offices of the sheriff himself." *Com. Dig. Viscount* (B. 1). We think the undersheriff, therefore, has authority to empower his officers to put the seal to an instrument of this sort.

*Henry James* now showed cause.—The 2d section of the Bills of Sale Act enacts, that, "if such bill of sale shall be made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance or condition or declaration of trust shall, for the purposes of this act, be taken as part of such bill of sale, and shall be written on the same paper or parchment on which such bill of sale shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such bill of sale shall be null and void to all intents and purposes as against the same persons and as regards the same property and effects as if such bill of sale or a copy thereof had not been filed according to the provisions of this act." There was no such trust here as was required to be noticed. *Montague*, not choosing that his name should appear

(a) There, an assignment of a lease by deed taken in execution was made in the name and under the seal of office of the sheriff by A. B., acting as undersheriff; and it was held that such assignment was sufficiently proved, without proving further the appointment of A. B. as undersheriff, and that he had power by deed to execute deeds in the name of the sheriff.



in the transaction, advanced the money in the name of Robinson, \*780] his attorney. As between the latter and Montague there may be a trust; but it is not such a one as the statute contemplated. It is neither within the words nor the mischief of the act. The arrangement between Montague and Robinson had nothing to do with the *making* or *giving* the bill of sale: it was neither a defeasance, a condition, or a trust as between the parties to the bill of sale.

*Bovill*, Q. C., and *Keane*, Q. C., in support of the rule.—These instruments do not comply with the requisites of the statute. The title of the act is, "An act for preventing frauds upon creditors by secret bills of sale of personal chattels:" and it recites that "frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors." The 1st section enacts that "every bill of sale of personal chattels made after the passing of this act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or, in case the same \*781] shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed," &c., "otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale, under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale, in the execution of any process of any court of law or equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be." And

then comes the 2d section, which enacts, that, if such bill of sale shall be made or given subject to any defeasance, condition, or *declaration of trust*, not contained in the body thereof, such defeasance, condition, or declaration of trust shall be taken as part of the instrument, and be \*written on the same paper or parchment. The object of [\*782 these provisions, was, to compel a complete and true disclosure of the real nature of the bargain, in order that creditors or assignees may have the means of inquiry as to the bona fides of the transaction between the assignor and the assignee under the bill of sale. [ERLE, C. J.—If Berkeley had an equity of redemption, no doubt that must appear. But, why should the grantee disclose upon the face of the bill of sale where he got the money which he advanced? Suppose Robinson had been trustee for Berkeley's wife, and had advanced this money out of the trust-fund?] That fact should have appeared. The provision is not limited to trusts for the grantor: it deals with trusts generally. [KEATING, J.—Read with the preamble, that must mean trusts in favour of the grantor.] The whole act consists of a series of provisions applying to the grantee, not merely to the grantor. These requirements are to be pursued most strictly. This is illustrated by the 3d section, which requires the officer to keep a book or books, "in which he shall cause to be fairly entered an alphabetical list of every such bill of sale, containing therein the name, addition, and description of the person making or giving the same, or, in case the same shall be made or given by any person under or in the execution of process as aforesaid, then the name, addition, and description of the person against whom such process shall have issued, and also of the person to whom or *in whose favour* the same shall have been given, together with the number, and the dates of the execution and filing of the same, and the sum for which the same has been given, and the time or times (if any) when the same is thereby made payable," according to the form contained in the schedule. In the second column of the schedule is to be inserted the name and description of \*the person to whom the bill of sale is made or given. [\*783 It is of the utmost importance that this should be *truly* stated, in order that the validity and fairness of the transaction may be tested. The legislature evidently contemplated the possibility of fraud being committed in a variety of shapes: and, in order as much as possible to guard against that, it has made the most stringent provisions for the purpose of compelling a disclosure of the *whole* of the transaction.

ERLE, C. J.—I am of opinion that these bills of sale are valid notwithstanding the arguments which have been urged against them founded upon the provisions of the Bills of Sale Act, 17 & 18 Vict. c. 36. The statute, as I read it, requires, that, where the bill of sale is made or given subject to any defeasance or condition or declaration of trust in which the grantor or giver thereof has an interest, it shall be registered with the bill of sale. The evil to be avoided, was, the baffling of creditors by sham bills of sale by which the whole interest of the grantor in the subject-matter was apparently transferred to the grantee, whereas in truth some interest or trust remained in the former. Creditors or assignees, provided no interest remains in the grantor, cannot require to be informed whether the grantee holds the

goods assigned on his own behalf or as trustee for another. Here, Robinson is the grantee. The money he advanced as the consideration for the grant was the money of Montague. But I see nothing in the act of parliament which requires that the relation in which Robinson stood to Montague shall appear upon the face of the instrument.

BYLES, J.—I am of the same opinion: and I have derived my notions on the subject from the observations made by Mr. James upon the 2d section of the \*statute, which have convinced me that the \*784] trusts there referred to clearly are trusts in favour of the grantee. It appears to me that any other construction would be highly inconvenient. It might be that the persons advancing the money were trustees, and it might be convenient that the security should be taken in the name of one of their number: and, if the argument on the part of the defendant were well founded, the instrument would be void unless all these circumstances were explained upon the face of it. The words "any defeasance, condition, or declaration of trust not contained in the body thereof," seem to me to point to such trusts as would ordinarily appear upon the face of such an instrument, and which affect its operation as between the grantor and the grantee. These alone are within the mischief to be remedied, and are what the legislature intended should be remedied. I agree that the 3d section, which requires an entry of the name of the person to whom or in whose favour the bill of sale is given, is not confined to bills of sale executed by the sheriff, but extends to all bills of sale by whomsoever given. But I do not think that affects the present question. I do not think it necessary that the name of Montague should appear.

KEATING, J.—I am of the same opinion. I agree with the rest of the court that the object of the statute is sufficiently attained by compelling the registration of all conditions or declarations of trust which are made in favour of the grantor. To require the grantee to disclose upon the face of the register where he obtained the money wherewith to purchase the goods, might possibly convey to the execution-creditor information which might under some circumstances be useful. But I do not think that that is the effect of the statute. I see nothing \*785] in its provisions to require \*this trust to appear. In truth there was no "declaration of trust." All that could have been put upon the register here, if the entire transaction had been disclosed, would have been a state of facts which would have induced a court of equity to declare a trust as between Robinson and Montague. That clearly is not the sort of trust which the statute contemplated.

Rule discharged.

## BARKER v. THE METROPOLITAN RAILWAY COMPANY.

Nov. 7.

The plaintiff, who had a leasehold interest in premises held by a tenant from year to year, received notice from a projected railway company that the premises were required for the purposes of their undertaking; and the company subsequently arranged with the *tenant* and received from him the key. The plaintiff thereupon gave the company notice, under the 68th section of the Lands Clauses Consolidation Act, 1845, of the amount of her claim and the nature of her interest in the premises, and requiring them to issue their warrant to the sheriff to summon a jury; and, upon their neglecting so to do, she brought an action for the sum claimed:—

Held, that these facts warranted the jury in finding that the company had *actually taken* the premises, and consequently that they were liable for the amount demanded.

THIS was an action brought by the plaintiff to recover compensation from the Metropolitan Railway Company for her interest in certain leasehold premises in Conduit Street East, Paddington, which were alleged to have been *taken* by the company under the powers contained in their special acts.

The declaration stated that the defendants were a railway company incorporated by the Metropolitan Railway Act, 1854, and the plaintiff was entitled to compensation in respect of an interest in certain land which had been taken by the defendants, as being the promoters of the undertaking, to make the said railway in the said act mentioned and thereby authorized to be made, for the execution of the works of the said \*railway; that the defendants as such promoters as aforesaid had not made satisfaction to the plaintiff [\*786 in respect of her interest in the said land, which exceeded the sum of 50*l.*; that the plaintiff, desiring to have the said compensation settled by a jury, gave notice in writing of such her desire to the defendants as such promoters as aforesaid, stating in the said notice the nature of her interest in the said land in respect whereof she claimed compensation, and the amount of compensation so claimed by her, being 850*l.*; that the defendants, as such promoters as aforesaid, were not willing to pay the amount of compensation so claimed, nor did they enter into a written agreement for that purpose, nor did they within twenty-one days after the receipt of the said notice issue their warrant to the sheriff to summon a jury for settling the same, in the manner provided by law; and that, by reason of their default to issue their warrant as aforesaid, the defendants became and were liable to pay to the plaintiff, being so entitled as aforesaid, the amount of compensation so claimed by her as aforesaid; and that all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to recover the last-mentioned sum from the defendants, yet that the defendants had not paid the said amount of compensation: Claim, 850*l.*

The defendants pleaded,—that the plaintiff was not entitled to compensation as alleged; and that the land in the declaration mentioned was not and had not been taken by the defendants as alleged. Issue thereon.

The cause was tried before Erle, C. J., at the sittings at Westminster after last Trinity Term. The facts were as follows:—In 1858, notice was given by the defendants to the plaintiff that the premises in

\*787] question were required for the purposes of their \*undertaking, and that they were ready to treat, and in 1860 they gave a bond under the 85th section of the Lands Clauses Consolidation Act, 1845. 8 & 9 Vict. c. 18. At this time the premises were in the occupation of one Taylor as tenant from year to year to the plaintiff. Nothing further was done until January, 1864, when, the company having arranged with Taylor for the transfer of his interest to them, the key was handed over to them. Taylor paid rent for the premises down to Christmas, 1863.

The plaintiff thereupon gave the company a notice, under s. 68, claiming 850*l.* as compensation for her interest in the land so taken, and requiring the company to issue their warrant to summon a jury. The company did not issue their warrant, and intimated that they did not at present require the premises for the purposes of their railway.

On the part of the defendants, it was submitted that there was no evidence that they had *taken* the plaintiff's land under the compulsory powers given to them by the Lands Clauses Consolidation Act and the special act; but that they had merely possessed themselves of Taylor's interest.

His Lordship, however, ruled that there was evidence enough to warrant the jury in finding, if they were so minded, that the company had taken the premises under the acts of parliament.

The jury returned a verdict for the plaintiff for the amount claimed.

*Keane*, Q. C., pursuant to the leave reserved to him, moved to enter a verdict for the defendants, on the ground that there was no evidence to go to the jury of their having taken possession of the premises so as to entitle the plaintiff to claim compensation. The 6th \*788] section of the 8 & 9 Vict. c. 18 enacts, that, "subject \*to the provisions of this and the special act, it shall be lawful for the promoters of the undertaking to agree with the owners of any lands by the special act authorized to be taken, and which shall be required for the purposes of such act, and with all parties having any estate or interest in such lands, or by this or the special act enabled to sell and convey the same, for the absolute purchase for a consideration in money of any such lands, or such parts thereof as they shall think proper, and of all estates and interests in such lands of what kind soever." The 68th section enacts, that, "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been *taken* for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and, if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed,

and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or, if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be \*lawful for him to give notice in writing of such his desire [789 to the promoters of the undertaking, stating such particulars as aforesaid, and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts." The words "lands which have been *taken* for or injuriously affected by the execution of the works," in that section, have been held to include such lands only as are *actually* taken or *actually* affected by the works: *Burkinshaw v. The Birmingham and Oxford Junction Railway Company*, 5 Exch. 475. The 84th, 85th, and 89th sections plainly show that "taken" here does not mean merely acquiring a right to take, but an actual physical taking. One of the objects of these provisions was, to give the undertakers a right to exercise a discretion as to the time and manner of taking possession of lands required for their works. As between the company and Taylor, the tenant, they took *his* interest under the compulsory powers of the act. But there was no evidence whatever of any taking possession of the interest of the reversioner. All they did, was to get rid of the particular tenant.

ERLE, C. J.—I think there should be no rule in this case. I think there was abundant evidence to warrant the jury in finding that the land was in fact taken by the defendants. The plaintiff had an interest in the premises as a termor. The company having given \*notice [790 of their intention to take them for the purposes of their works, the plaintiff gave them notice of her claim, and of her desire to have the compensation to which she was entitled assessed by a jury. It then became their duty to issue a warrant for summoning a jury. They have failed to do so, and consequently the plaintiff is entitled to the money claimed by her. The case comes clearly within the words of s. 68.

BYLES, J.—I am of the same opinion. The jury found that the land was taken under the act and for the purposes of the act: and I do not see how they could have found otherwise. The company clearly did not intend to become tenants from year to year under the plaintiff. The case falls within the very words of the 68th section. I cannot see the smallest ground for doubt.

KEATING, J.—I am of the same opinion. The case was properly left to the jury, and they found that the company had taken the land so as to bring them under the obligations of the 68th section. I cannot see how they could have come to any other conclusion.

Rule refused.

\*791]

\*HOBBS v. HENNING. Nov. 16.

1. Goods that are contraband of war, in the course of transport from a neutral port to a neutral port, in a neutral ship, are not by the law of nations liable to seizure by the cruisers of a belligerent state, even though the shipper may know or intend that they shall ultimately reach a port belonging to the enemies of the captors. To render goods contraband of war liable to seizure, they must be taken in delicto, that is, in the actual prosecution of a voyage to an enemy's port.

2. Nor does the mere fact that the ship carries simulated papers per se operate a forfeiture of either ship or goods, though it may afford evidence from which a prize court may infer that the ship or goods were enemies' property, or that her destination was to a blockaded port or to an enemy's port with contraband of war.

3. The sentence of a foreign Court of Admiralty condemning a ship or goods as lawful prize, is not conclusive in the courts of this country as to the ground of condemnation, unless stated upon the face of it without ambiguity. It is competent to our courts to examine the sentence carefully to see whether it proceeds on that which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country.

4. To an action upon a valued policy on goods on board the *Peterhoff* at and from London to Matamoras (a port in Mexico notorious for being the place to which goods contraband of war intended for the use of the confederate states of North America were sent, for the purpose of being forwarded to Wilmington or Charleston), against capture amongst other things, and averring a loss by a peril insured against,—the defendant pleaded (seventhly) that the goods were contraband of war, and were shipped by the insured for the purpose of being sent to and imported into a port in North America situate in a state engaged in hostilities with the United States of America, and were liable to be seized by the cruisers of the United States as contraband of war, and that the ship was during the continuance of the risk and at the time of the loss carrying goods and papers which rendered her liable to be seized by such cruisers, and that the ship and goods were seized accordingly,—of all which the defendant at the time of subscribing the policy was wholly ignorant.

The plaintiff replied to the seventh plea, that the voyage in the declaration and in the policy of insurance mentioned was a voyage to a certain port in Mexico, to wit, to Matamoras, and not a voyage to any port in North America situate in a state engaged in hostilities with the United States of America, and that the said ship and goods while proceeding on the said voyage to Matamoras were seized as in the declaration alleged.

The plaintiff also demurred to the seventh plea, on the ground that it disclosed no defence to the action :—

Held, that it was consistent with the plea that the goods were sent from a neutral port to a neutral port in a neutral ship, and therefore not liable to seizure; that the allegation that they were shipped for the purpose of being sent to an enemy's port, did not deny the destination to the neutral port to which the insurance related, but merely introduced a purpose existing in the mind of the assured for the ulterior disposition of the cargo and ship after the termination of the voyage insured, and consequently that the plea was no answer to the action; that the allegation that the ship was carrying papers which rendered her liable to be seized, was not an accurate statement in reference to the law of nations, the having simulated papers alone not being a breach of neutrality so as to work a forfeiture of the ship; and that the allegation that the defendant at the time of effecting the insurance was ignorant of the premises was under the circumstances an immaterial allegation.

5. The eighth plea stated, that, before action brought, the ship and goods were during hostilities between the United States of America and the confederate states seized by the cruisers of the United States of America, and carried to a port in the said United States, and such proceedings were duly and according to the law of nations had that it was duly adjudged and determined by an United States prize court held at New York, and having competent jurisdiction, that the said ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea, and that the said ship with her said cargo was not truly destined to the port of Matamoras, but, on the contrary, was destined to some other port or place, and in aid and for the use of persons then at war with the said United States, and in violation of the law of nations, and that the ship's papers were simulated and false as to her real destination, and thereupon it was considered and adjudged by the said court, then having competent jurisdiction in that behalf, that the said ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited accordingly :—

Held, that the conclusion to be arrived at from an examination of the judgment set out in

the plea, was, that the court did not intend to find, as a matter of fact, either that the ship had not sailed on a voyage to Matamoras, or that, after having so sailed, she had deviated from that voyage; but that, on the contrary, they condemned her as lawful prize because she was in the prosecution of that voyage with an ulterior destination either for the cargo or the ship, or both, as before explained; and that therefore the judgment did not sustain the inferences of fact which the defendant sought to establish thereby, or sustain his claim of right to prevent the plaintiff from showing the truth in respect of this fact; and therefore that the plea was bad.

6. Held also, that the eighth plea was open to the further objection that it did not plead the issuable fact in respect of the voyage, but the *evidence* which might prove that fact.

7. And held by Erie, C. J., and Byles, J. (Keating, J., not dissenting), that the eighth plea and the rejoinders hereafter mentioned were bad, because the finding of a matter of fact in the course of the adjudication of a prize-court, cannot be pleaded as an estoppel in the cases where, if adduced in evidence, the judgment would be received as conclusive evidence of the fact so found.

8. The rejoinder to the replication to the third plea stated that the plaintiff ought not to be admitted to take issue on the third plea, and deny the truth thereof, because before action brought the ship and goods were during hostilities between the United States of America and the confederate states seized and carried into port as in the eighth plea mentioned, and such proceedings were thereupon had and such adjudication made as in that plea mentioned; and that, before action brought, all things had happened and all times had elapsed necessary to make the said adjudication binding on the plaintiff, and to entitle the defendant to rejoin the same as an estoppel to the plaintiff's said replication. The rejoinder to the second replication to the seventh plea set out the sentence of the New York prize-court, as in the eighth plea. To each of these rejoinders the plaintiff demurred, on the ground that it could not be pleaded as an estoppel in answer to the replication:—

Held, that the rejoinders were bad for the same reasons as those for which the eighth plea was held bad.

THIS was an action upon a valued policy of insurance on goods on board the *Peterhoff* at and from London to Matamoras, with leave to call at any intermediate port or ports. The perils insured against were declared to be *"of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detentions of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners,"* &c., &c. The policy was effected by the plaintiff as agent for Messrs. Weatherall & Co., and averred a loss by a peril insured against, and that all conditions were fulfilled and all things happened and all times elapsed to entitle the plaintiff to be paid the sum insured by the defendant and to maintain this action; yet that the defendant had not paid the said sum.

The third plea stated that the said ship, with the *\*said goods* on board thereof, did not sail on the voyage covered by the said policy, as in the declaration alleged. [\*792]

The seventh plea stated that the said goods were contraband of war, and were shipped by the plaintiff and the said Messrs. Weatherall & Co. for the purpose of being sent to and imported into a port in North America situate in a state then and now engaged in hostilities with the United States of America, and were liable to be seized by the cruisers of the United States as contraband of war; that the ship in the policy mentioned, was during the continuance of the risk, and at the time of the loss, carrying goods and papers which rendered her liable to be seized by such cruisers; and that the said ship and goods were seized accordingly, which was the loss complained of,—of all which the defendant before and at the time of making the said insurance and subscribing the said policy was totally ignorant.

The eighth plea stated, that, before action brought, the said ship



and goods were, during hostilities between the United States of America and the confederate states, seized by the cruisers of the United States of America, and carried into a port of the said United States; that such proceedings were thereupon duly and according to the law of nations had, that afterwards, and before action brought, it was duly adjudged and determined by an United States prize-court held at New York, in the said United States, and then having competent jurisdiction in that behalf, that the said ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war and had them in the act of transportation at sea; and that the said ship with her said cargo was not truly destined to the port of Matamoras, but, on the contrary, was destined to some other port or place, \*794] and in aid and for the use of persons then at war with the said United States, and in violation of the law of nations; and that the ship's papers were simulated and false as to her real destination; that thereupon it was considered and adjudged by the said court, then having competent jurisdiction in that behalf, that the said ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited accordingly, which was the loss complained of; that, before action brought, all things had happened and all times had elapsed necessary to make the said judgment binding on the plaintiff, and to entitle the defendant to plead the same as an answer to this action; and that the said judgment so pronounced was absolutely final and conclusive, and was still in full force and effect, not reversed, annulled, or otherwise vacated.

The plaintiff by his first replication took issue on all the pleas.

The second replication to the seventh plea stated that the voyage in the declaration and in the policy of insurance mentioned was a voyage to a certain port in Mexico, to wit, to Matamoras, and not a voyage to any port in North America situate in a state then or now engaged in hostilities with the United States of America; and that the said ship and goods, while proceeding on the said voyage to the said port of Matamoras, were seized as in the declaration alleged. Joinder.

The plaintiff also demurred to the seventh and eighth pleas, on the ground that those pleas respectively disclosed no defence to the action. Joinder.

First rejoinder, as to so much of the plaintiff's first replication as related to the third plea,—that the plaintiff ought not to be admitted to take issue on the third plea and deny the truth thereof, because \*795] the defendant said that before action brought the said ship and goods were, during hostilities between the United States of America and the confederate states, seized and carried into port as in the eighth plea mentioned, and such proceedings were thereupon had, and such adjudication made, as in that plea mentioned; that, before action brought, all things had happened and all times had elapsed necessary to make the said adjudication binding on the plaintiff, and to entitle the defendant to rejoin the same as an estoppel to the plaintiff's said replication to the defendant's third plea; and that the said judgment was absolutely final and conclusive, and still was in full force and effect, not reversed, annulled, or otherwise vacated.

Third rejoinder to the second replication to the seventh plea,—that

the plaintiff ought not to be admitted to plead the said second replication to the seventh plea, because the defendant said, that, before action brought, the said ship and goods were, during hostilities between the United States of America and the confederate states, seized by the cruisers of the said United States, and carried into a port of the said United States, and such proceedings were thereupon duly and according to the law of nations had, that, afterwards and before action brought, it was duly adjudged and determined by an United States prize-court held at New York, in the said United States, and then having competent jurisdiction in that behalf, that the said ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea, and that the said ship, with her said cargo, was not truly destined to the part of Matamoras, a neutral port, and for the purpose of trade and commerce within the authority and intendment of public law, but, on the contrary, was destined for some other port or place, and in aid of and for the use of the enemies of the said United States, and \*in violation of the law of nations, and that the ship's papers were simulated and false as to her real destination, and that it was considered and adjudged by the said court, then having competent jurisdiction in that behalf, that the said ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited accordingly; that, before action brought, all things and times had happened and elapsed necessary to make the said judgment binding on the plaintiff, and to entitle the defendant to rejoin the same as an estoppel to the plaintiff's second replication to the seventh plea; and that the said judgment of the said prize-court was and is absolutely final and conclusive, and still was in full force and effect, and not reversed, annulled, or otherwise vacated. [\*796]

The defendant also demurred to the second replication to the seventh plea, the ground stated in the margin being, "that the fact of the ship being bound to Matamoras is no answer to the seventh plea." Joinder.

The plaintiff took issue on the rejoinder to the replication to the third plea. He also demurred thereto, the ground of demurrer stated in the margin being, "that the matter contained in the said rejoinder cannot be pleaded as an estoppel in answer to the replication." Joinder.

The plaintiff also took issue on the further rejoinder to the second replication to the seventh plea, and also demurred thereto on the same ground as last mentioned. Joinder.

*S. Temple, Q. C. (with whom was Hannen), for the plaintiff (a)—*

(a) The points marked for argument on the part of the plaintiff were as follows:—

*As to the demurrer to the seventh plea,--*"1. That, as the policy is against capture, the facts set forth in the plea, if they showed that the capture was legal, are wholly irrelevant:

"2. That it does not appear from the said plea that the said goods were at the time of the said seizure on a voyage to any port in a state engaged in hostilities with the United States, and therefore that the character of contraband could not attach to them:

"3. That it is consistent with the said plea that the said goods were on their way to Matamoras, a neutral port, for the purpose of their being sent from that port by canal or by another sea voyage to a port in a state engaged in hostilities with the United States, in which case the seizure of them by the United States cruisers would not be justifiable:

\*797] Two questions arise upon these \*demurrers,—first, whether the seventh plea is a good answer to the action,—secondly, whether the sentence of the prize-court at New York is conclusive as an estoppel to prevent a recovery in this action.

\*798] 1. The fact of the goods being contraband of war of \*itself is no answer to the action. In Arnould on Insurance, 2d edit., Vol. 1, p. 765, the law upon this subject is thus laid down,—“All insurances on articles contraband of war are wholly void and incapable of being enforced in the courts of the *belligerent* country: Marshall on Insurance 75; Gibson v. Service, 5 Taunt. 433 (E. C. L. R. vol. 1), 1 Marsh. 119 (E. C. L. R. vol. 4). If, however, effected by or for neutrals, and sought to be enforced in the court of a *neutral* state, the case would be different; for, it is not deemed unlawful in a neutral by his own government to be engaged in a contraband trade. The contraband articles, indeed, are liable to seizure and confiscation at the hands of the enemy; but the neutral is never punished by his own sovereign for his contraband shipments. The insurance, therefore, by a neutral of articles contraband of war, being per se a valid contract, may be enforced in the courts of the neutral country, provided *the nature of the trade and of the goods was disclosed to the underwriter*, or provided there be just ground, from the circumstances of the trade or otherwise, to presume that he was duly informed thereof.” 3 Kent's Comm. 267, edit. 1844. There is nothing illegal in shipping goods for a neutral port like Matamoras (which is on the Mexican side of the Rio Grande), though the merchant may well know that their ultimate destination is most likely to be \*Wilmington or \*799] Charleston. And the allegations in the seventh plea do not go beyond that. It is true, the plea goes on to allege that the ship was liable to be seized: but it should have set out in what respect it was so liable. [ERLE, C. J.—The plea alleges, and the demurrer admits, that the insurer was ignorant of the facts. It may be, that, if the premises are all immaterial, the ignorance of them is immaterial. The observation is suggested by the passage cited from Arnould.]

“4. That it is consistent with the plea that the goods which rendered the vessel liable to be seized were other goods than those of the plaintiff, and that the plaintiff's goods were seized solely in consequence of the presence on board the ship of other goods and papers, of which the plaintiff and the other persons interested were wholly ignorant:

“5. That it is consistent with the said plea that the goods were at the time of the seizure on a lawful voyage to a neutral port, in which case the plea affords no answer to the action.”

*As to the demurrer to the eighth plea*,—“1. That the alleged grounds of adjudication in the prize-court are irrelevant in this action:

“2. That it is ambiguous on the face of the said judgment of the prize-court as set out in the eighth plea, what the ground of condemnation was, and therefore it is not conclusive against the plaintiff:

“3. That the said judgment does not necessarily proceed on any ground falsifying any warranty contained in the policy as to the plaintiff's goods:

“4. That it is consistent with the said judgment that the plaintiff's goods were part of the cargo not contraband of war shipped for and intended to be unshipped at Matamoras, and that the Peterhoff, after landing the plaintiff's goods there, was about to proceed with the contraband cargo to some other port.”

“The plaintiff will also contend that the rejoinders demurred to are respectively bad on the same grounds upon which the eighth plea is bad, and also on the ground that they ought not to be pleaded by way of estoppel; and that the second replication to the seventh plea is good as an answer to that plea if the plea be good, inasmuch as it shows that the vessel was seized while on a voyage to a neutral port, and therefore the character of the goods or papers on board were in no way material in relation to the said policy.”

The insurer may be ignorant of facts which he ought and is presumed to know.

2. The eighth plea in terms sets out the judgment of the prize-court at New York, and pleads it by way of estoppel. A sentence of a foreign court of Admiralty, however, is conclusive in this country only provided the court here can see that the grounds upon which it proceeded are in accordance with the law of nations and with natural justice, if it professes to set out the grounds of its judgment. That is clearly laid down by Tindal, C. J., in *Dalglish v. Hodgson*, 7 Bingh. 495 (E. C. L. R. vol. 20), 5 M. & P. 407. The plaintiff insured goods on board the ship *George*, upon a voyage "from Liverpool to Buenos Ayres, and any port or ports in the river Plate; and, in the event of a blockade, or being ordered off the river Plate, with liberty to proceed to any other port in South America not round Cape Horn." The declaration averred a loss by capture. It appeared that a notification of the blockade of the ports in the river Plate belonging to the government of Buenos Ayres had been published in the London Gazette: that the *George* sailed from Liverpool on the 2d of August, bound for Buenos Ayres, with instructions to the captain, in the event of his being warned off by an intimation from the Brazilian cruisers of the existence of the blockade, to proceed to Monte Video, and there land the cargo; that, on the 6th of October, about 6 p. m., \*the vessel arrived abreast of the port of Monte Video, [\*800 two leagues distance; that, the wind blowing from the port, and the master not meeting with any ship of war, or any other vessel from which he could obtain any intelligence respecting the state of the port of Buenos Ayres, he continued his voyage, and proceeded further up the river Plate in pursuance of his instructions, conceiving that the blockade of Buenos Ayres no longer existed, until he had got somewhat beyond the point of Lara, about 10 p. m. on the night of the 7th of October, when he descried the Brazilian squadron, and immediately let go his anchor in sight of the squadron; that, while the ship was at anchor, an officer belonging to the Brazilian corvette of war *Ymperica* came on board the *George*, and took away the ship's register, logbook, and the instructions relative to the voyage, together with other papers relating to the ship and cargo; that the master was at the same time conveyed on board the commodore's frigate *Nitroy*, and one-half of the crew sent on board the corvette *Ymperica*; that the master was detained on board the frigate until the 11th, on which day the *George*, with the goods on board, was carried into Monte Video as a prize by the Brazilian squadron; and that, after the *George* and the goods were taken into Monte Video, proceedings were commenced in the prize-court there, and on the 13th of December, the following sentence was pronounced by the judge of that court:—"In virtue of summary process against the English brig *George*, taken by the van-guard of the imperial squadron now blockading the enemy's port in the river Plate, it plainly appears from all the documents brought forward in the said process, that the said brig sailed from Liverpool knowing of the said blockade, and which the captured do not even deny, neither that her \*destination was Buenos Ayres, from which port at only a short distance she was taken; and for this reason it is evident she [\*801

ought to be considered as violating the said blockade, and which she would have effected but for the diligence of the capturers, in spite of all the means tried to evade it: neither are the endeavours used by the captured to get a part of the cargo of this prize into Buenos Ayres less notorious, but which having not been able to accomplish in other vessels, and the same being returned to England, they were in hopes to do in this; and this with all diligence, as is proved by the official report, fol. 57, and as is clear by the evasions the captain had recourse to in his answers to the interrogatories, and in the clause shown in the translated letter, fol. 44 and 65: for as much as besides not doing away the proof that Buenos Ayres was the first port the shipment was destined for (in itself criminal), it also happened that the captured had not even the plausible excuse of coming to this port of Monte Video first to get intelligence, and thereby comply with the published instructions; on the contrary, it is proved by the log-book translated, fol. 68, that they saw it and passed even much beyond it, and where they were captured: from all which, and from what the documents state, I judge the said brig George and her cargo to be good and lawful prize to the capturers." This court held that the grounds of condemnation did not appear so explicitly on this sentence as to prevent the courts of this country from inquiring into them. "The general law upon this subject," says Tindal, C. J., "is well known, that the sentence of a foreign court of Admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, where such fact appears on the face of the sentence free from doubt and ambiguity. But it is at \*802] the same time as well established, that, in order to conclude the parties from contesting the ground of condemnation in a court of law, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty whether the ship was condemned upon one ground which would be a just ground of condemnation by the law of nations, or another ground which would only amount to a breach of the municipal regulations of the condemning country." -After criticising the language of the document, his Lordship concludes,—“Under a sentence, therefore, expressed with so much doubt and ambiguity as to the real ground on which it proceeded, we hold ourselves at liberty to determine, whether, upon the evidence given at the trial, such violation of the blockade did in fact take place or not; and, upon that question, we are satisfied on the evidence that the captain did not break nor did he intend to break the blockade, but that he honestly intended to obtain instructions from the blockading squadron, not having been before warned off by any of the Brazilian cruisers.” The adjudication here is against the *ship* on the ground that she was carrying simulated papers and goods contraband of war really destined for an enemy's port. It is nowhere alleged that the plaintiff's goods were contraband of war: and the allegation that the goods were not truly destined for the neutral port of Matamoras is traversed. The mere fact of the ship's papers being simulated is no ground of condemnation. It is true, the eighth plea does allege that the ship and goods were destined to some other port or place and in aid and for the use of persons then at war with the United States, and in violation of the

law of nations. But the sentence, so far as it appears, does not show in what respect the law of nations has been violated. \**[BYLES, J. —Contraband of war alone may have one effect; but, coupled with simulated papers, the effect may be different.]* [\*803 In *Bernardi v. Motteux*, 2 Dougl. 575, it was held that a condemnation by a foreign Court of Admiralty is not conclusive evidence that the ship was not neutral, unless it appear that the condemnation went upon that ground. Lord Mansfield there says: "The first principles are clear and admitted. All the world are parties to a sentence of a Court of Admiralty. Here, there is a monition published at the Exchange, and in other countries at some place of general resort, and any person interested may come in and appeal at any time, if there has been no laches. If there *has*, the time of appeal is limited. But the sentence, as to that which is within it, is conclusive against all persons, unless reversed by the regular court of appeal. It cannot be controverted collaterally in a civil suit. The difficulty here is, what the ground was on which the French court of Admiralty went,—whether the ground of enemy's property, or that of the papers having been thrown overboard. By the maritime law of all countries, throwing papers overboard is considered as a strong presumption of enemy's property, and upon that principle the *Arrêt* of 1778<sup>(a)</sup> is founded. But, in all my experience in England, I have never known a condemnation on that circumstance only. It is made use of as a strong \*ground of suspicion. The *arrêt* is very rigid. It is difficult to find [\*804 out what the ground of this sentence was. I *incline* to think the court went upon the ground of *enemy's property*, and considered the want of the papers as a strong presumption of that fact; but they did not examine the captain upon interrogatories as to the contents of the papers: and, upon the whole, enough does not appear on this obscure sentence to ascertain precisely upon what it was founded, and some other method ought to be taken to inquire what the ground of it was. As to whatever it *meant* to decide, we must take it as conclusive." In *Pollard v. Bell*, 8 T. R. 434, it was held that a warranty of neutrality in a policy of insurance is not falsified by a sentence of a foreign court of Admiralty condemning a ship for navigating contrary to the ordinances of that belligerent state, to which the neutral country had not assented. Lord Kenyon, in delivering judgment, says: "This is one of the numberless questions that have arisen in consequence of the extraordinary sentences of condemnation passed by the courts of Admiralty in France during this war. I do not think that they were characterized too strongly at the Bar, when it was stated that they all proceeded on a system of plunder; but, still, until the legislature interferes on this subject, we, sitting in a court of law, are bound to give credit to the sentences of a court of competent jurisdiction. If, therefore, in this instance, the French court had con-

(a) For the regulation of the marine, &c., 26th July, 1778, art. 3. "All vessels taken, of what nation soever, either neutral or allied, from which it is known that *any papers* have been thrown into the sea, suppressed, or abstracted, shall be declared good prize, together with their cargoes, upon the mere proof that *some papers* have been thrown into the sea, without any necessity of examining what those papers were, by whom they were thrown, or even though a sufficient quantity should remain on board to *justify* that the ship and its cargo belonged to friends or allies."

demned this ship on the ground that it was not Danish property, we should have been concluded by that sentence in this action, and must (however reluctantly, it being stated as a fact in the beginning of the case that it was a Danish ship,) have given judgment for the defendant. This is proved by the different cases cited in the argument, with the decisions in which I concur, and it is supported by \*805] \*reason." And after going through the facts, and referring to *Mayne v. Walter*, 2 Park Ins. 581, his Lordship concludes,— "On the whole, therefore, I am of opinion that, though, if contrary to justice the ship had been condemned simply because she was not a Danish ship, we should have been concluded by that sentence; yet, as the courts abroad have endeavoured to give other supports to their judgment which do not warrant it, and have stated as the foundation of the sentence of condemnation, one of their own ordinances which is not binding on other nations, this sentence does not prove that the ship in question was not a neutral ship, and, consequently, the plaintiff is entitled to recover." So, in *Calvert v. Bovill*, 7 T. R. 523, a sentence of a French prize-court was held not to be conclusive evidence against a warranty of neutrality, because the special grounds assigned for the sentence did not necessarily lead to such a conclusion. "If," said Lord Kenyon, "that court had stated in their sentence that they condemned the goods because they were British property, I should have considered myself bound by their sentence; but they have assigned other reasons for their adjudication: the express grounds of the sentence of condemnation are, that the ship was destined for one of the West India islands, that she was hired and loaded at London, and that she had a certain quantity of gunpowder on board, therefore they condemned her and her cargo as good prize. Then it is impossible for us to conclude that the French court decided on the ground that this was British property, when all the evidence in the cause, and the reasons expressly given by them for their judgment, lead to a contrary conclusion." That is an extremely strong case. [ERLE, C. J.—The substance of the decision is, that, if the premises set out in the foreign sentence do not warrant the conclusion, \*806] the court here will \*not hold itself bound by it.] Precisely so. Again, in *Fisher v. Ogle*, 1 Campb. 418, Lord Ellenborough says: "We show a sufficient respect for French sentences, if we attach credit in our courts to what they distinctly say. It is often painful to go this length, considering the piratical way in which they proceed. But this sentence does not say that the ship was *not* American, and it is not to be considered as evidence of what it does not specifically affirm. I dare say such sentences will be positive enough in future, since those who frame them are disposed to consider everything as good prize against all mankind. When they do speak out, I will give them the same effect here which they receive in other places. But there is no proof in the present case that the property was not American, though such an inference might be drawn from certain indirect statements in the sentence now presented to us." In the following term a rule for a new trial was moved for, but refused,— Lord Ellenborough saying: "I must look to the adjudicative part of the sentence, and there I find nothing distinctly stated as to the ship or her cargo not being American. Have you any case in which it

was held that judges must fish for a meaning, when a sentence of this kind is produced to them? Here, the foreign court seems not to have formed any settled opinion upon the subject, and not to have known or cared on what grounds it proceeded to a condemnation. It is by an overstrained comity that these sentences are received as conclusive evidence of the facts which they positively aver, and upon which they specifically profess to be founded." In *Saloucci v. Woodmass*, Park Ins. 362, Lord Mansfield laid it down as a rule, that, where no other ground appeared, the condemnation of a ship *as prize* must be taken to have proceeded on the ground of enemies' property, and distinguished that case from *Bernardi v. Motteux*, as there [\*807 another ground, namely, the *arrêt*, appeared, on which the condemnation might have proceeded. These cases are all commented on in the notes to *The Duchess of Kingston's Case*, 2 Smith's Leading Cases 642, 691, 692, where the result is thus summed up: "Upon the whole, the rule appears to be,—1. That the sentence of a foreign court of Admiralty of competent jurisdiction pronounced in rem, is conclusive against all the world as to the existence of the ground on which the court professes to decide. 2. It would seem from *Saloucci v. Woodmass* that such a court shall *perhaps*, where it states no ground of decision, be presumed to have decided on the ground which would warrant its decision in the terms in which it is pronounced; and that, therefore, where a vessel is condemned *as prize*, the court would be presumed to have condemned it on the proper ground, namely, an infraction of neutrality, or, what amounts to the same thing, a breach of treaty. But, thirdly, that this presumption ends where it appears doubtful upon the face of the sentence itself whether the ship was not condemned upon some other ground, such, for instance, as the infraction of a mere local ordinance. In such a case, it is apparent that the words *as lawful prize*, even if used, may be, and probably are, a mere misapplication of terms, so far as they may lead to the inference that a breach of neutrality has been committed." As to that part of the judgment of the prize-court which alleges that the ship carried simulated papers,—why, it may be asked, should the falsity of the ship's papers affect the innocent owners of the goods? It is not alleged that they were parties to any deceit. It may be that the captain of the *Peterhoff* intended to land the plaintiff's goods at Matamoras, and then to proceed to break the blockade at Wilmington or elsewhere. But the owner of the goods may, \*nevertheless, [\*808 have been guiltless of any violation of the law of nations. Simulated papers, unless the underwriters consent to their being carried, have been held to avoid an insurance on ship: *Horneyer v. Lushington*, 15 East 46, 3 Campb. 85; *Fomin v. Oswald*, 3 Campb. 357, 1 M. & Selw. 398; *Oswald v. Vigne*, 15 East 70; *Bell v. Bromfield*, 15 East 364; *Steel v. Lacy*, 3 Taunt. 285. But it is otherwise in the case of a mere assured of goods, who is not answerable for the proper documenting of the ship, without a warranty or representation of her national character: *Bell v. Carstairs*, 14 East 374. Through-out the cases, the having simulated papers is considered as conclusive evidence of the ship being enemies' property. Mr. Arnould says upon this subject,—1 Arnould on Insurance, 2d edit. 734,—“Owing to the unexampled difficulties thrown in the way of English commerce



by the ambition of Napoleon during our last great maritime wars, it became necessary, in order to carry on trade with the continent at all, to do so by the aid of simulated papers: but, although it was notoriously impossible for our own or neutral ships to trade, especially to the Baltic ports, without having such papers on board, yet our courts uniformly held that the sentences of foreign tribunals of prize expressly proceeding on the ground of the ship's carrying simulated papers, were conclusive to discharge the underwriter from his liability, except where there was an express leave given in the policy to carry them." There is nothing upon this record to show that the having simulated papers on board formed a ground for the condemnation of the goods as being enemies' property. For these reasons, it is submitted that the adjudication which is the subject of the eighth plea and of the rejoinder to the replication to the third plea is not conclusive, but \*809] that it is competent to the assured to show that it may have \*proceeded upon a ground which is not warranted by the law of nations.

*Lush, Q. C.* (with whom was *Sir George Honyman*), *contra* (a)—The plaintiff declares upon a policy on goods on a voyage from London to Matamoras. The seventh plea alleges that the goods were contraband of war, and were shipped by the insured for the purpose of being sent to and imported into a port in North America situate in a state engaged in hostilities with the United States of America, and were liable to be seized by the cruisers of the United States as \*810] contraband of war, and that the ship was during the \*continuance of the risk and at the time of the loss carrying goods and papers which rendered her liable to be seized by such cruisers, and that the ship and goods were seized accordingly,—of all which the defendant at the time of subscribing the policy was wholly ignorant. A neutral, no doubt, has a perfect right to trade with either belligerent party: nor is a policy intended to cover the risk of conveying goods to an enemy's port, or of breaking a blockade, illegal, except in the sense that the party attempting it subjects the ship and cargo to confiscation, whether the goods are contraband of war or not. A neutral trades at his own peril with a blockaded port. Where there is no blockade, or no efficient blockade, a neutral may trade to the

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the third plea is a valid answer to the plaintiff's claim, as it shows that there never was any inception of the voyage insured:

"2. That the judgment of the American prize-court set out in the defendant's first rejoinder estops the plaintiff from denying the truth of the said third plea:

"3. That the seventh plea is good, as showing a loss by a peril not insured against:

"4. That such seventh plea is good, as showing that the said venture was one in violation of the law of nations:

"5. That the seventh plea is good, as showing a loss caused by the default and act of the assured:

"6. That the second replication to the seventh plea gives no answer to it; such replication admitting that the goods were shipped for the purpose of importation into the confederate states, and were liable to seizure:

"7. That the second replication to the seventh plea, if good, is sufficiently answered by the judgment of the American prize-court set out in the defendant's third rejoinder, which estops the plaintiff from setting up the matters relied on by him in his replication:

"8. That the eighth plea shows a valid answer to the plaintiff's claims, as the judgment of the American prize-court there stated estops the plaintiff from controverting the matters stated in such judgment, and shows that the plaintiff is not entitled to recover in this action."

port with everything which is not contraband of war. If he attempts to carry thither contraband of war, he violates his neutrality, and renders himself liable to capture.<sup>(a)</sup> In 1 Kent's Commentaries, 10th edit. 149, the law is thus laid down:—"When goods are once clearly shown to be contraband, confiscation to the captor is the natural consequence. This is the practice in all cases, as to the article itself, excepting provisions; and as to them, when they become contraband, the ancient and strict right of forfeiture is softened down to a right of pre-emption on reasonable terms. But, generally, to stop contraband would, as Vattel observes (Book 3, c. 7, § 113), prove an ineffectual relief, especially at sea. The penalty of confiscation is applied, in order that the fear of loss might operate as a check on the avidity for gain, and deter the neutral merchant from supplying the enemy with contraband articles. It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods, without \*any complaint on the part of the neutral merchant, and without any imputation of a breach of [\*811 neutrality in the neutral sovereign himself. It was contended on the part of the French nation, in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry, themselves, to the belligerent powers, contraband articles, subject to the right of seizure in transitu. This right has since been explicitly declared by the judicial authorities of this country.<sup>(b)</sup> The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act." Wheaton (on International Law), edit. 1863, pp. 727, 767, 806, is to the same effect. Both those learned authors show that it is not necessary that the ship or the goods should be going to a belligerent port: it is enough if the object and purpose of the shipper is that they shall ultimately reach a belligerent port. The insurance is not valid; the insurer being put in a position of risk which he never contemplated when he underwrote the policy. [ERLE, C. J.—You say the insurance is void by reason of a supposed purpose in the mind of the shipper?] Yes. It is the purpose in the mind of the assured which determines the character of the transaction. Suppose the plaintiff had an agent at Matamoras ready on receipt of the goods to ship them across the river,—would not the first step taken for that purpose be illegal? and would not the goods be contraband and liable to seizure immediately on leaving England? \*[ERLE, C. J.—The consignee at Matamoras would be as willing to send the goods to [\*812 New York as to Wilmington, if he could get as good a price, or a better.] There are numerous cases in which it has been held that a contract is avoided by reason of an illegal purpose in the mind of one of the contracting parties: see *The Gas Light Company v. Turner*, 5 N. C. 666 (E. C. L. R. vol. 35), 7 Scott 779 (in error, 6 N. C. 324 (E. C. L. R. vol. 37), 8 Scott 609); *Lightfoot v. Tenant*, 1 Bos. & P. 551;

(a) See *Gist v. Mason*, 1 T. R. 88, and *Dalmady v. Motteux*, there cited.

(b) *America*. See *Richardson v. Marine Insurance Company*, 6 Mass. R. 102, 113; *The Santissima Trinidad*, 7 Wheaton R. 283.

Langton v. Hughes, 1 M. & Selw. 593; Waymell v. Reed, 5 T. R. 599. In Lightfoot v. Tenant, Eyre, C. J., says: "No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them. And it will seldom happen that this will be the whole for which he will have to answer. The man who knows that an illegal use is intended to be made of that which he is selling will be thereby impelled to use his knowledge to make the contract more beneficial to himself, and it may become his interest to stipulate for himself that the illegal use shall be made of the goods he sells; and so the illegal use may be the very gist of the contract. It is a possible case that a tradesman may wish to speculate in this contraband trade, and to do it by dividing the profits with some man of spirit and enterprise but without capital. Such a man would stipulate that the goods which he sold should be put on board a ship under a foreign commission, and should be sent to Calcutta to be there sold. His share of the profits would be found in the price originally fixed on the goods, but his hopes of payment would rest entirely on the returns of this contraband trade. Such a man would not advance 5*l.* worth of goods which were not to be employed in the contraband trade. It is essential to his views, and it enters into the spirit of his contract, that the goods shall be employed according to \*813] *their destination.*" Here, the seizure is the loss complained of; and that is brought about by the illegal act of the plaintiff himself. Capture, rightful or wrongful, is a total loss.

Then, as to the effect of the judgment in the prize court at New York. The judgment of the foreign court is conclusive as to all the material facts which it finds as the basis of its adjudication. Lord Chief Justice Tindal, in *Dalglish v. Hodgson*, 7 Bingh. 495, 504 (E. C. L. R. vol. 20), 5 M. & P. 407, says: "The general law upon the subject is well known, that the sentence of a foreign Court of Admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact on which such condemnation proceeded, when such fact appears on the face of the sentence free from doubt and ambiguity. But it is at the same time as well established, that, in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly on the face of the sentence. *It must not be collected from inference only.*" Assuming that to be a correct exposition of the law, what are the statements in this judgment? That the ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea, and that the said ship with her said cargo was not truly destined to the port of Matamoras, but, on the contrary, was destined to some other port or place, and in aid and for the use of persons then at war with the said United States, and in violation of the law of nations, and that the ship's papers were simulated and false as to her real destination: and the sentence goes on to say that *thereupon* it was considered and adjudged that the ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited \*814] *accordingly.* Here ample ground for a sentence of forfeiture is disclosed. The possession of simulated papers has always been held to justify seizure and condemnation of both ship and cargo.

In the case of *The Franklin*, 3 C. Rob. Adm. R. 217, 224, Sir W. Scott, after time taken to consider, says: "I have deliberated upon this case, and desire it to be considered as the settled rule of law received by this court, that the carriage of contraband, with a false destination, will work a condemnation of the ship as well as the cargo. In the earlier case of the *Sarah Christina*, 1 C. Rob. Adm. R. 237, the court, from a favourable regard to some particular circumstances, practised an indulgence in restoring the ship, but without freight and expenses, declaring it at the time to be an indulgence hardly reconcilable to just principle. Having now maturely and upon discussion considered the general point, I am decidedly of opinion that confiscation of the vessel is the legal result of the carriage of contraband under a false destination." The judgment of the prize court is conclusive as to the possession of simulated papers and the false destination. It is not left in doubt upon what ground the condemnation proceeded. [BYLES, J.—Chancellor Kent says,—1 Comm. 150, 10th edit.,—"The act of carrying contraband articles is attended only with the loss of freight and expenses, unless the ship belongs to the owner of the contraband articles, or the carrying of them has been connected with malignant and aggravating circumstances; and, among those circumstances, a false destination and false papers are considered as the most heinous. In those cases, and in all cases of fraud in the owner of the ship, or in his agent, the penalty is carried beyond the refusal of freight and expenses, and is extended to the confiscation of the ship and the innocent parts of the \*cargo.(a) This is now [\*815 the established doctrine."] The ground of condemnation here is, having on board goods contraband of war, and papers fraudulent and simulated as to their destination. If carrying contraband of war is not enough; if the possession of simulated papers is not enough; the essential inquiry was whether *Matamoras* was the true destination of the goods. The conclusion the court came to, was, that the papers were false, and that the true destination of the goods was some confederate port. [ERLE, C. J.—That the ship with her cargo was destined, not to *Matamoras*, but "to some other port or place:" it may be some neutral port.] It goes on, "and in aid and for the use of persons at war with the United States, and in violation of the law of nations." The propriety of the decision, it is conceded, cannot be inquired into: it is as conclusive as if the facts had been found by the verdict of a jury here.

*Temple*, in reply.—It clearly is not illegal to supply a belligerent with contraband of war either in this country or in a neutral port. If a neutral be conveying contraband of war for the purpose of being converted to the use of one of the belligerents, if they are seized by a cruiser of the opposite party, the merchant can claim no protection or redress from his own sovereign: he takes the goods at his own risk: but any contract he may have made in respect of them in his

(a) In support of these positions the learned commentator cites Bynk. Q. J. Pub. b. 1, co. 12, 14; Heinecc. de Nav. ob. Vect. Merc. Vetit. com. c. 2, § 6; Opera, tom. ii. 348; *The Staat Embden*, 1 C. Rob. Adm. R. 26, *The Jonge Tobias*, 1 C. Rob. Adm. R. 329; *The Franklin*, 3 C. Rob. Adm. R. 217; *The Neutralitet*, 3 C. Rob. Adm. R. 295; *The Edward*, 4 C. Rob. Adm. R. 68; *The Ranger*, 6 C. Rob. Adm. R. 126.

\*816] own country is perfectly valid. The rule is well stated \*in 1 Arnould on Insurance 765: "All insurances on articles contraband of war are wholly void and incapable of being enforced in the courts of the *belligerent* country. If, however, effected by or for neutrals, and sought to be enforced in the court of a *neutral* state, the case would be different, for, it is not deemed unlawful in a neutral by his own government to be engaged in a contraband trade. The contraband articles, indeed, are liable to seizure and confiscation at the hands of the enemy; but the neutral is never punished by his own sovereign for his contraband shipments. The insurance, therefore, by a neutral of articles contraband of war, being per se a valid contract, may be enforced in the courts of the neutral country, provided the nature of the trade and of the goods was disclosed to the underwriter, or provided there be just ground, from the circumstances of the trade or otherwise, to presume that he was duly informed thereof." The seventh plea does not show with any certainty that the object and purpose of the plaintiff was that the goods should be sent into a port in North America situate in one of the confederate states. It may be that the plaintiff knew that they would arrive at a market at Matamoras principally frequented by confederate buyers: but it does not follow that he shipped the goods for that port with the intention that they should be forwarded thence to a confederate port. The ignorance of the underwriter alleged in the plea, is ignorance of that which it did not import the assurers to know, and therefore that allegation is wholly immaterial. There is nothing in the destination of the ship or goods to taint this contract with illegality, within any of the authorities referred to. Then, as to the sentence set out in the eighth plea, the grounds therein stated are not sufficient to justify the seizure.

\*817] The court finds that *part of the cargo* was contraband \*of war: it may be that the plaintiff's goods were not of that character; and the ship had liberty (by the policy) to touch and stay at any intermediate port or ports. The possession of simulated papers may afford evidence against *the ship*; but the owner of *the goods* is not responsible for the regularity of the ship's papers. In all the cases where simulated papers have been held to be a ground of condemnation, there have been circumstances which warranted the conclusion that the goods were enemy's property. Here, the adjudication proceeds upon a totally different ground, viz., that the goods were intended to reach the hands of an enemy. [*Lush.*—The prize court has found as a fact that "the said ship with her cargo was not truly destined to the port of Matamoras, but, on the contrary, was destined to some other port or place, and in aid and for the use of persons then at war with the United States, and in violation of the law of nations,"—in effect, that the vessel did not sail on the voyage insured: and it is submitted that the plaintiff is bound by that finding.]

*Cur. adv. vult.*

ERLE, C. J., on a subsequent day delivered the judgment of the court: (a)—

The declaration is on a policy of insurance on goods, from London to Matamoras, in the usual form, and alleges a loss in the course of that voyage by a peril insured against.

(a) The case was argued before Erle, C. J., Byles, J., and Keating, J.

The seventh plea alleges that the goods were contraband of war, and were shipped by the plaintiff for the purpose of being sent to and imported into a port in a state engaged in hostilities with the United States, and were liable to be seized by the cruisers of the [\*818 \*United States as contraband of war; that the ship was carrying goods and papers which rendered her liable to be seized by such cruisers; and that the ship and goods were seized accordingly, which is the loss complained of,—of all which the defendant at the time of subscribing the policy was wholly ignorant.

The demurrer to this plea raises the question whether the facts alleged show a defence: and our answer is in the negative.

The plea was probably intended to be a defence on the ground of the concealment by the plaintiff of material facts. But we do not find sufficient averments to establish that defence. As we read the plea, we take it to be consistent therewith that the goods of the plaintiff were sent from a neutral port to a neutral port in a neutral ship. The allegation in the declaration that the goods were sent from London to Matamoras, is admitted by the plea: and, although we cannot notice judicially the situation of Matamoras, so neither can the defendant rely on its proximity to the confederate states, or make any unfavourable inference therefrom against the plaintiff, if the goods were in the course of transport from a neutral to a neutral port. The better opinion seems to be that war does not give to a belligerent any right to seize goods on account of their quality: see the authorities collected in *Ortolan Diplomatie de la Mer*, Vol. 2, pp. 165–213.

The allegation that the goods were shipped for the purpose of being sent to an enemy's port is an allegation of a mental process only. We are not to assume therefrom either that the plaintiff had made any contract or provided any means for the further transmission of the goods into the enemy's state, or that the shipment to Matamoras was an unreal pretence. If the goods were in a course of transmission, not to \*Matamoras, but to an enemy's port, the voyage would [\*819 not be covered by the policy: and that defence is raised in direct terms by the third plea. Here, the allegation does not deny the destination to the neutral port to which the insurance relates, but introduces a purpose existing in the mind of the assured, after the termination of the voyage insured, for the ulterior destination of the cargo and ship. It is consistent with that purpose, as here alleged, that the plaintiff made the consignment for mercantile profit as the end to be attained by him; in other words, that he knew of an effective demand for warlike stores at Matamoras, and was induced to send a supply by the expectation of a higher price, and that he expected that the purchase would probably be made on behalf of the confederate states, and in that sense had the purpose that the goods should pass into those states. In that sense, *price* was the ultimate end which he purposed to attain; and federal and confederate were alike indifferent as a means, provided he attained that end: and in a neutral territory he might lawfully sell to either.

The distinction between a mere mental purpose that an unlawful act should be done, and a participation in the unlawful transaction itself, is made more clear by reference to the cases of *Holman v. Johnson*, Cowp. 341, and *Lightfoot v. Tenant*, 1 Bos. & P. 554. In the

former, the plaintiff in a foreign country sold goods to the defendant, knowing that he purposed to smuggle them into England; and in one sense the plaintiff there sold them with the purpose that they should be so smuggled; but, as he did not participate in any way in the unlawful transaction, the mere mental purpose did not avoid the contract of sale. In the second case (*Lightfoot v. Tenant*), the plaintiff sold goods to the defendant, to be delivered abroad in order that they \*820] should be sent unlawfully to the East Indies: \*after verdict for the defendant on a plea alleging this fact, on motion for judgment non obstante veredicto, the objection was raised that the mere mental purpose of the vendor did not avoid the contract of sale: but the objection was answered by suggestion of the fact that the plaintiff's participation in the unlawful transaction went beyond the mere mental purpose, that he was taken to be a party to the whole project, and to be acting in the execution thereof in the sale, which was the cause of action: and upon these facts the contract was held void.

For these reasons, we think the averment "that the goods were shipped for the purpose of being sent to an enemy's port" (construing those words as we have done), is insufficient to establish that they were liable to seizure for a breach of neutrality.

The effect of the other allegations in the plea depends much on that which we have last considered. If goods fit for immediate use in war, and therefore of the quality described by the term contraband of war, are passing between neutrals, it seems that they are not liable to seizure by a belligerent. The right of capture, according to Sir William Scott's opinion expressed in the case of the *Imina*, 3 C. Rob. Adm. R. 168, attaches only where they are passing on the high sea to an enemy's port,—“They must be taken in delicto, that is, in the actual prosecution of a voyage to an enemy's port.”

The liability, therefore, of these goods to lawful seizure, although their quality was such as might make them contraband of war, depended on their destination; and they were not liable, unless it distinctly appeared that the voyage was to an enemy's port.

The further allegation that the ship was carrying goods and papers which made them liable to be seized, is immaterial as a ground of \*821] defence; for, these goods \*are not alleged to be the plaintiff's goods, and the plaintiff is not shown to be responsible for the ship's papers, nor for any other goods than his own. Also, if the voyage was to a neutral port, and the law be as above stated, the facts alleged do not show that the ship and goods were liable to seizure.

Furthermore, the allegation that the ship was carrying papers which made her liable to be seized, is not strictly accurate, in reference to the law of nations. The papers alone are not a breach of neutrality so as to work a forfeiture of the ship: they are only evidence from which a cause of forfeiture may be inferred: they may be evidence either of enemies' property or of destination to a blockaded port, or to an enemy's port, with contraband, and so be evidence on which the judge may find a cause of forfeiture proved: but they are in themselves no cause of forfeiture. The language of Sir William Scott, in the case of *The Franklin*, 3 C. Rob. Adm. R. 221, speaking of

simulated papers, and saying that "this fraudulent conduct justly subjects the ship to confiscation," must be taken with reference to the question before him,—whether the ship should be confiscated as well as the contraband cargo: and his decision is in the affirmative, and rightly if the shipowner was knowingly conveying contraband to an enemy's port, of which knowledge papers indicating a false destination would raise a presumption.

These being the premises alleged in the plea, the allegation that the defendant was ignorant of them is of no avail. If the defence is that the plaintiff has concealed a fact which he was bound to disclose, the plea should have been framed accordingly. As it stands, it shows no wrongful act on the part of the plaintiff towards the insurers.

If the proper construction of the premises in the \*plea be different from that which we have come to, still the allegation [\*822 of the defendant's ignorance of those premises would not make the plea a good defence on the ground of concealment. The insurance is against capture, lawful and unlawful; and the defendant, in order to discharge himself, must show a concealment by the assured. Mr. Phillips,—Phillips on Insurance, Vol. 1, § 531,—says: "Concealment is where one party suppresses or neglects to communicate a material fact." It is quite consistent with anything appearing on this record, that a letter from the plaintiff may have miscarried, or that the defendant may have remained in ignorance, without any default of the plaintiff. The allegation, therefore, of the ignorance of the defendant is of itself immaterial, and has no effect in avoiding the policy; and the result is that we consider the seventh plea to be bad.

We proceed now to the eighth plea, which in substance alleges that the ship did not sail on the voyage covered by the policy.

The third plea pleads the same ground of defence as a fact in direct terms: the eighth plea pleads it by way of estoppel, setting out a judgment in which the fact is supposed to be stated as a matter whereon the court had adjudicated, and then relying on the judgment to estop the plaintiff from denying that fact. The same estoppel is the ground of two rejoinders to two replications: and the eighth plea and the two last-mentioned rejoinders may be considered together.

The defendant, in support of these pleas, relied on the rule that sentences of foreign courts deciding questions of prize are to be received as conclusive evidence in actions on policies, on every subject immediately and properly within the jurisdiction of the court on which it has professed to decide judicially: see the opinions of the judges in *Lothian v. Henderson*, 3 Bos. & P. 499: and he con- [\*823 tended that the judgment as pleaded showed that the voyage on which the ship was captured was not a voyage from London to Matamoras. The plaintiff, in answer, contended,—first, that the decision does not profess to determine the matter of fact on which the defendant relies,—and, secondly, if it had decided that matter of fact, still that the decision could not be pleaded as an estoppel. And we of opinion that the plaintiff is right.

The rule making the decision of a court which creates the status of a person or thing conclusive upon all persons as to the existence of that status, has been regarded as salutary. Sentences of nullity of marriage in the Ecclesiastical courts, of forfeiture in the Exchequer,



of settlement of paupers by the quarter sessions, and of prize in prize-courts, are examples. In *Hughes v. Cornelius*, 3 Show. 495, the rule was applied within salutary limits, where, in trover for a ship by the former owner, the sentence of a prize-court was held conclusive to show that the property had been changed. See *Doe v. Oliver*, 2 Smith's Leading Cases, p. 677, where the whole subject is fully considered with much learning and lucid arrangement.

But the rule making the finding of a judge upon any matter of fact upon which he professes to form his judgment conclusive upon all the world, has been supposed to be anomalous, and to produce pernicious results: see Lord Eldon's opinion in *Lothian v. Henderson*, 3 Bos. & P. 499, to that effect. Also in *Geyer v. Aguilar*, 7 T. R. 695, 681, Lord Kenyon speaks of the rule as a source of the grossest injustice. So, in *Fisher v. Ogle*, 1 Campb. 418, Lord Ellenborough, speaking of this rule, says: "The doctrine rests on a case in Shower, which does not fully support it; and the practice of receiving these sentences often leads in its consequences to the grossest injustice."

\*We would further refer to *Dalglish v. Hodgson*, 7 Bingh. \*824] 495 (E. C. L. R. vol. 20), 5 M. & P. 407, where Tindal, C. J., says that the sentence of a prize-court is not conclusive as to the ground of condemnation, if there be any ambiguity as to what the ground is. It must not be left in uncertainty whether the ship was condemned on a ground which would be just by the law of nations, or on another ground, which would amount only to a breach of the municipal regulations of the condemning country. Although these sentences must be received in evidence, still the precedents show, that, when received, they have been carefully examined, for the purpose of seeing whether the matter of fact in proof of which they are adduced was clearly and certainly found by the judge whose sentence is relied on. *Bernardi v. Motteux*, 2 Dougl. 581, and *Calvert v. Bovill*, 7 T. R. 523, are two among numerous cases which might be cited to this effect.

We now proceed to examine the judgment set out in the eighth plea. The condemnation appears to us to have been for carrying contraband of war intended to be for the use of the enemies of the United States: and the sentence, so far from deciding that the ship with the said goods did not sail on the voyage from London to Matamoras, appears to us to express that she was on that voyage when she was taken. The first matter of fact found by the judge is, that the ship was knowingly on *the voyage aforesaid* (that is, from London to Matamoras), laden with contraband. The second is, that the said ship with the said cargo was not truly destined to Matamoras, a neutral port, and for the purpose of trade and commerce within the authority and intendment of public law, but was destined for some other port or place, and in aid and for the use of the enemy, and in violation of the law of nations; and that the ship's papers were simulated and false.

\*If the judge meant to find that the ship was not bound to \*825] Matamoras, but, on the contrary, to a port of the enemy, the finding would have been so expressed. But, if he meant to find that she was bound to Matamoras, not for the purpose of commerce with the inhabitants thereof, but for the purpose of such a sale or transfer

there as that the confederates should get the use of the cargo, all the words of the judgment have their usual meaning and effect. We have no jurisdiction to inquire into, nor are we at all considering the validity of the legal grounds of the judgment: our task is, to ascertain what matter of fact the judge found to exist. He may have considered that trading with the confederates was not within the authority and intendment of public law, and was in violation of the law of nations; and that a voyage to Matamoras, in order that the cargo should be transferred from thence to some port or place for the use of the confederates, was a destination of the cargo for such port or place, and made it liable to confiscation; and that the papers were simulated and false, because they represented Matamoras as the final destination, and concealed a purpose of ulterior destination.

By this examination of the judgment set out in the plea, we are led to the conclusion that the learned judge did not intend to find as a matter of fact, either that the ship had not sailed on a voyage to Matamoras, or that, after having so sailed, she had deviated from that voyage. But, on the contrary, he condemned her as lawful prize because she was in prosecution of that voyage with an ulterior destination, either for the cargo or the ship, or both, as above explained.

The judgment, therefore, does not sustain the inferences of fact which the defendant seeks to establish thereby; nor does it sustain his claim of right to prevent the plaintiff from showing the truth in respect of this fact: and the plea is therefore bad.

\*Thus far the judgment is the judgment of myself, my Brother Byles, and my Brother Keating. The other answer [\*826 to the eighth plea is the opinion of my Brother Byles and myself. My Brother Keating neither assents nor dissents.

We are further of opinion that the eighth plea and the same rejoinders as last mentioned are bad, because the finding of a matter of fact in the course of the adjudication of a prize-court cannot be pleaded as an estoppel in the cases where, if adduced in evidence, the judgment would be received as conclusive proof of the fact so found. Although the cases are numerous in which the evidence has been admitted, still there is no precedent for the plea of the fact as an estoppel, that we have been able to find.

The principle on which the evidence was held admissible, is not clear. Lord Eldon, in *Lothian v. Henderson*, 3 Bos. & P. 499, says it was introduced at first against the insurers to prove the loss, and was afterwards used by the insurers for their defence. Lord Ellenborough, in *Fisher v. Ogle*, cited *suprà*, speaks of it as a matter of comity between the two courts. Such evidence does not fall within any legal description of matter of estoppel; nor is it guarded by the safeguards against abuse which restrict matters of estoppel in respect of parties and of subject-matter. In *Barrs v. Jackson*, 1 Y. & C. C. C. 585, cited in *Doe v. Oliver*, 2 Smith's Leading Cases 677 (5th edit.), Knight Bruce, V. C., gives an elaborate judgment on estoppel, and lays down the principle thus,—“Generally, neither the judgment of a concurrent nor of an exclusive jurisdiction is conclusive evidence of any matter which came collaterally in question before it, though within the jurisdiction, or of any matter incidentally cognisable, or of any

matter to be inferred by argument from the judgment; and a judgment is final only for its proper purpose and object."

\*827] \*The admissibility of the judgments of prize-courts upon matters of fact, is not restricted within these limits; and although we are bound here to hold that they are admissible so far as the decided cases have established their admissibility, yet beyond that limit we would not go: and we considered that the attempt to use the judgment as an estoppel does transgress that limit, there being no precedent for it. In relying upon the absence of any precedent, we do not consider that this objection is confined to matter of form. It restricts in some degree the tendency of such evidence to defeat real truth by technical proof; and it may have the effect of preventing the foreign judgment from being misunderstood or misapplied.

If the judgment can only be adduced in evidence, and is not pleadable as an estoppel, the meaning may be ascertained by adducing in evidence the preliminary proceedings and other matters referred to in the judgment.

In *Bernardi v. Motteux*, 2 Dougl. 575, Lord Mansfield admitted a French arrêt, and expressed his opinion that the procès verbal on which the judgment was founded ought to have been given in evidence at the trial by the plaintiff, to show the meaning of the judgment, that is, to show whether the court intended to find enemy's property, and so to prove a breach of warranty of neutrality, or to condemn by reason of an arrêt against throwing papers overboard. So, in *Christie v. Secretan*, 8 T. R. 192, the court by the special case had power to refer to the proceedings before the Tribunal de Commerce, and also to a printed copy of a treaty between France and America, to show the meaning of the judgment. So, in *Pollard v. Bell*, 8 T. R. 434, the court referred for the same purpose to the judgments in the Tribunal de Commerce at Bordeaux, in the Tribunal Civil de la Gironde, and in the \*Cour de Cassation at Paris. So, in *Dalgleish v. Hodgson*, 7 Bingh. 494 (E. C. L. R. vol. 20), 5 M. & P. 407, the circumstances under which the ship entered the River Plate were admitted in evidence, to show the meaning of the judgment,—that is, to show whether she was condemned for breaking blockade or for disobedience to a municipal law of Brazil.

These are the considerations which induce us to adhere to precedent and reject the plea of estoppel.

If the judgment here in question should be hereafter adduced in evidence in support of the third plea, it may be that it would be found to refer to pleadings and doctrines of public law, and to various classes and items of proof relating to acts and declarations of parties on board, and so forth: and, if the judgment was given in evidence, these matters so referred to therein might be also adduced in evidence, and might show that the fact was not found by the judge, as supposed by the defendant. This inquiry would not tend to impeach the conclusive effect of the judgment upon the question of prize, but might prevent a mistaken assumption from prevailing over the truth.

For these reasons, we give our judgment on these demurrers for the plaintiff.

We consider the eighth plea open to the further objection, that it does not plead the issuable fact in respect of the voyage, but the

evidence which might prove that fact. It pleads the probans, and not the probandum. But, as this objection would not apply to the rejoinder to the replication to the third plea, we do not further advert to it.

Judgment for the plaintiff.(a).

(a) The matter was not further contested.

## \*IN THE EXCHEQUER CHAMBER, [829

MICHAELMAS VACATION.

### MADDICK and Another v. MARSHALL. Nov. 30.

The defendant and others, as provisional directors of a projected joint-stock company, resolved at a meeting that the company should be advertised in several newspapers, and directed their secretary to take the necessary steps for that purpose. The secretary accordingly applied to an advertising agent, to whom (on his calling at the company's offices to inquire under what authority the secretary was acting) *he showed the prospectus and the above resolutions :—*

Held,—affirming the judgment of the Common Pleas,—that there was evidence to go to the jury that the directors who were parties to the resolutions were responsible for the debt thereby incurred, notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all the preliminary expenses would be provided for by him, and that they would incur no liability,—there being nothing to show that the secretary, in giving the orders, or in communicating to the plaintiffs the resolutions of the directors, had acted beyond the scope of his actual or apparent authority as secretary.

THIS was an action brought by the plaintiffs, who are advertising agents in London, against the defendant, a merchant in London, for the recovery of 1376*l.* 5*s.* for advertising "The Adelaide (North Arm) Port and Railway Extension and Land Company, South Australia." The declaration contained counts for work and materials provided, for money paid, and money due on an account stated. Plea, never indebted. Issue.

The cause was tried before Erle, C. J., at the Kingston Surrey Assizes, 1864. The evidence was in substance as follows :—

Alfred Maddick, one of the plaintiffs, stated that he became acquainted with one Payne (the secretary of the company) in January, 1863, who promised to get him and his partner appointed agents to the company; that, in June of that year, he called at the company's offices, 36, Old Broad Street, City, and there saw Payne, and asked him who were to be the responsible parties for his account, to which Payne answered, "The directors, of course," telling him that "the minutes were passed," and handing him a prospectus which described the company as consisting of a capital \*of 400,000*l.*, in 20,000 shares of 20*l.* each, and stated the company to be formed for [830 the purpose of affording more convenient accommodation for the shipping and commerce of the colony of South Australia, and contained (amongst others) the name of Marshall (the defendant), as one of the directors, and that of Payne as secretary; that, on the 10th of June, 1863, he received from Payne an order (which was also signed by one Allan, who was represented by Payne to be the "manager" of the company) to advertise the company in a great number

of newspapers in town and country; that the first advertisement was accordingly inserted on the 11th of June; that he again saw Payne on the 11th of June, when that gentleman produced to him the minute-book of the company, and pointed out to him the minutes dated the 2d of April, 1863, and 2d and 5th of June, 1863, all of which were signed by Marshall as chairman.

The minute of the 2d of April, 1863, purported to be a minute of a meeting of "the gentlemen interested in the establishment of the company." The proposed prospectus having been read and discussed, it was resolved, amongst other things, that certain persons (amongst whom was the defendant) should be directors; that the prospectus then read be approved and adopted and printed forthwith; that Payne be the secretary; and "that it is inexpedient to advertise the company pending the Easter Holidays, but that the prospectus of the company be forwarded to the daily papers, with a request to announce its issue; and that the prospectus be advertised in the necessary newspapers on Wednesday next, the 8th instant; and that, in the meantime, it be distributed and circulated by post and otherwise to such persons as are likely to become subscribers of capital."

\*831] The minute of the 2d of June stated that it was "resolved, amongst other things, "that the prospectus be finally settled and revised by a committee consisting of Mr. Marshall, Mr. Spicer, and Mr. Browne, with power to deal with any matters connected therewith; and that, when approved by them, the prospectus be printed and forthwith advertised."

And by the minute of the 5th of June "authority was given to the secretary to have the prospectus printed, as finally revised."

The witness further stated that the whole of the advertisements charged for were inserted between the 11th of June and 25th of August, 1863, on which last-mentioned day the plaintiffs received notice to cease advertising; that, his account having been sent in to the offices of the company, he made repeated applications to Payne for a settlement without effect; that he addressed a letter to Mr. Marshall containing the following passage,—“We informed your secretary before commencing the business that we could not undertake the advertising unless we were furnished with the proper authority from the gentlemen then serving on the direction; copies of the usual minutes passed authorizing the insertion of the advertisements were then handed to us, upon which we acted;” and that, no answer being returned to this letter, the plaintiffs instructed their solicitors to apply for payment to Marshall, who repudiated all liability.

On cross-examination, the witness stated that he had had a great deal to do with advertising public companies; that he was never told that Payne was the promoter of this company, or that he (Payne) had procured several gentlemen to act as directors and that the promoters were to pay the preliminary expenses; and that he was never either by Payne or by Allan informed that he was to look to them for payment, and that they were to be the responsible parties.

\*832] \*Payne, who was called as a witness for the plaintiffs, on his examination in chief, stated that he was secretary of the company; that the defendant was introduced to him in March, 1863; that twenty-five shares qualified as a director; that the defendant was to

have free shares presented to him; that the resolutions were signed by the defendant; that the defendant was present when the prospectus was settled; that he afterwards saw the plaintiff, Maddick, who said he would like to see if he (Payne) had a proper authority, before advertising the prospectus; that he said it was generally given in the form of a minute from the board, and he should like to see it; that he (Payne) then showed him the minute, when he said it was satisfactory, and he would advertise the company; that the newspapers and lists were always laid on the board table; that the defendant took great interest in the company, and saw the newspapers and lists; that, with the defendant's sanction, he, on the 23d of June, 1863, addressed a letter to one Purdy, the manager of the Australian Bank, informing him that advertisements inviting subscriptions for the company's capital would be inserted in the leading papers in Adelaide, Melbourne, and Sydney, and requesting him to instruct the agents of the bank to receive deposits for the company; and that the advertisements were laid before the board.

On cross-examination, Payne stated that Allan and his co-owner of the estates agreed to be purchased by the company had contracted to pay him 10,000*l.* out of the purchase-money, in consideration of his services; that he (Payne) had never agreed to pay the preliminary expenses; that it was always understood that Allan was to pay them; that he (Payne) had applied to several gentlemen to become directors, but not to the defendant; that he wrote letters to the directors, \*agreeing that they were not to be looked to for preliminary [\*833 expenses, telling them that Allan was in a position to pay and would pay all preliminary expenses, including advertisements, and that they (the directors) were not to be called upon; that there was no allotment of shares; and that he did not tell the plaintiff before the orders were executed that there was an agreement that Allan should pay all the preliminary expenses.

The plaintiffs' books were then put in, showing that the company alone was debited in them.

The defendant's evidence was in substance as follows:—I came to arrangements that I was not to be liable for preliminary expenses, before I joined as a director. The arrangement was, that the directors were to be guaranteed against all preliminary expenses by Payne and Allan, who, I was told, were the promoters of the company. On the faith of that, I joined the company. I remember a board meeting before November, at which the question of preliminary expenses was discussed. Phillips (the solicitor to the company), Allan, and Payne, were present. Several directors, and I among them, asked who was to pay the preliminary expenses; when Payne and Allan said arrangements had been made; and Phillips said he had satisfied himself that was so. Something was said about an undertaking. Mr. Phillips was asked to give his undertaking: but he said it was unusual for professional men to give guarantees, but we might trust to his professional character that it was all right. It was after that I attended at the meetings. I never saw the defendant before to-day; and I never had any communication with him by letter, and never heard of any contract made by Payne with him on my behalf, until the dispute with the plaintiff. I never knew that Payne had shown

\*834] the minute-book. I was not aware \*he had shown it to any one. The plaintiffs' account was never submitted to the board by Payne; nor was it ever mentioned. I did not hear of the claim until I received Maddick's letter of the 5th of January last.

Allan, who was called on the part of the defendant, stated that he and his partner were the owners of the property in Australia; that he first became acquainted with Payne in 1861; that Payne volunteered him his services; that he was to give him 10,000*l.* out of the first moneys, out of which he (Payne) was to pay every preliminary expense; that they made an estimate of them, in which 1000*l.* was put down as the probable expense of advertising; that the subject of the preliminary expenses was discussed at the first meeting of the company; that Payne was present, and said that all arrangements had been made; that the defendant was present, and he then asked Phillips, the solicitor, to give a letter or undertaking, when he said it was not usual for solicitors to give an undertaking; that he never heard the advertisements discussed at board-meetings, that is, the paying for advertisements; that the advertisements were to be paid for by Payne, as part of the preliminary expenses; and that Payne told him he had arranged with Mr. Maddick as to the advertising question.

Mr. M'Arthur stated that he was applied to by Payne to become a director; that, at first, he declined altogether; that he afterwards consented to join; that he asked who was to pay preliminary expenses; that Payne then said he would give him a letter of guarantee that none of the directors should be liable to pay preliminary expenses; that he took up and paid for shares to qualify him as a director; that he understood from Payne that some letter of guarantee had been given to other directors, and that the money was not to come from the funds of the company.

\*835] \*On the part of the defendant it was submitted that there was no evidence to go to the jury of the defendant's liability to the plaintiffs' claim.

The learned judge thought there was evidence to go to the jury, but reserved leave to the defendant to move to enter a nonsuit, if the court should think he ought to have given such leave; and, subject thereto, he left to the jury the questions whether the defendant had held out Payne, the secretary, to the plaintiffs as having authority to pledge the defendant's credit for the advertisements, and whether the plaintiffs had trusted to the defendant's credit or had trusted Payne and Allan,—telling the jury, that, if the plaintiffs looked to Payne and Allan, the defendant was entitled to the verdict.

The jury returned a verdict for the plaintiffs for the amount claimed, subject to arrangement.

In the following Easter Term the defendant moved for a rule nisi to enter a nonsuit. The court, however, refused to grant it,—holding that the directors who were parties to the resolutions authorizing the insertion of the advertisements were responsible for the cost thereby incurred, notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all preliminary expenses would be provided for by him, and that they would incur no liability; there being nothing to show that the secretary, in giving the orders, or in communicating to the advertising

agents the resolutions of the directors, had acted beyond the scope of his actual or apparent authority as secretary; see 16 C. B. N. S. 387 (E. C. L. R. vol. 111).

Against this decision the defendant, with the leave of the court, appealed, and the case now came on for argument in the Exchequer Chamber before Pollock, C. B., Crompton, J., Bramwell, B., Mellor, J., and Shee, J.

\**Lush*, Q. C. (with whom was *J. Brown*), for the appellant.— [\*836 The question is whether there was any evidence to go to the jury to fix the defendant, to show that he authorized the secretary (Payne) to pledge his credit. [POLLOCK, C. B.—He gave the secretary the means of obtaining credit, by showing a plausible ground which might induce any one to give him credit.] Payne, without authority from the defendant or any of the other directors, showed the plaintiff the resolutions directing him to advertise the company, without disclosing the circumstances under which the parties had agreed to become directors. In giving judgment in the court below, Willes, J., states the substance of the evidence to be that the work was done in procuring advertisements to be inserted in certain newspapers for a company of which the defendant was a provisional director, that his name appeared as such in the prospectus, that it was necessary to the process of forming a company that advertisements should be published, and that the defendant and others of the directors at a meeting had resolved that they should be so published, and had given directions which ordinarily would have authorized their secretary to order the work in question to be done. That might be so, provided there was no arrangement to the contrary. The learned judge then goes on,—“Up to this point the case is a clear one. In none of the numerous cases to which allusion has been made has the question ever arisen in the present form; because nobody ever entertained a doubt, whatever the position occupied by provisional directors as to the secretary, that, upon a resolution of the provisional directors that advertisements shall be inserted, acted upon by the secretary, the person advertising may sue the persons who made the resolutions and so authorized the advertisements to be inserted. The resolution of the 2d of June, \*therefore, was a plain direction to the secretary, on the part of the provisional directors, to cause the work to be done for [\*837 them.” This, it is submitted, is not correct. The secretary had no authority to communicate a part of the arrangement, and withhold the rest. After observing upon the “secret arrangement” between the directors and the secretary, his lordship adds,—“It appears to me that the directors *did* authorize the secretary to represent, if the inquiry were made of him, what was the authority under which he acted. It was most natural that such an inquiry should be made. It is in the ordinary and necessary course of what would take place upon such a resolution being entered into. If a man is to be bound by the ordinary and necessary consequences of his acts, the defendant must be responsible for the orders given by the secretary.” That reasoning, it is submitted, is entirely fallacious. If the resolution had gone on to say,—“such advertisements to be inserted at the sole expense of Payne,” could it have been said that the secretary had



authority from the directors to show part of the arrangement and conceal the rest? That is, in effect, what Payne did here. The minute-book is a mere private record of the transactions of the company. The only authority Payne had, was, to advertise at his own expense. The directors did not authorize him to go to the plaintiffs and tell them half the truth. [POLLOCK, C. B.—The signing the resolution was a fact. The enveloping it in other circumstances does not affect the question, which is, whether the directors are not responsible for the representations which they enabled the secretary to make.] There is no evidence that the directors authorized the secretary to make any representations at all. The mere fact of their being provisional directors does not impose any liability on the parties \*838] or confer upon the secretary \*any authority to fix them with contracts. The true doctrine is that put by Pollock, C. B., in *Reynell v. Lewis* and *Wyld v. Hopkins*, 15 M. & W. 517, 526: "The plaintiff, on whom the burden of proof lies in all these cases, must, in order to recover against the defendant, show that he (the defendant) contracted expressly or impliedly; expressly, by making a contract with the plaintiff; impliedly, by giving an order to him under such circumstances as show that it was not to be gratuitously executed: and, if the contract was not made by the defendant personally, it must be proved that it was made by an agent of the defendant properly authorized, and that it was made as his contract. In these cases of actions against provisional committee-men of railways, it often happens that the contract is made by a third person; and the point to be decided, is, whether that third person was an agent for the defendant for the purpose of making it, and made the contract as such. The agency may be constituted by an express limited authority to make such a contract, or a larger authority to make all falling within the class or description to which it belongs, or a general authority to make any; or it may be proved by showing that such a relation existed between the parties as by law would create the authority, as, for instance, that of partners, by which relation, when complete, one becomes by law the agent of the other for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it; or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent. In all these cases, if the agent, in making the contract, acts on that authority, the principal is bound by the contract, and the agent's contract is his contract, but not otherwise." In *Lindley on Partnership*, p. 45, it is said that \*839] "the doctrine that a person \*holding himself out as a partner, and thereby inducing others to act on the faith of his representations, is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle of estoppel by conduct acted on and explained in *Pickard v. Sears*, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 N. & P. 488, and *Freeman v. Cooke*, 2 Exch. 654." Suppose the directors had given the secretary 1000*l.* to pay for these advertisements at the time the resolution for their insertion was passed, and the secretary had shown the plaintiffs the resolution, suppressing the fact of his having received the money,—could it have been contended in that case that the directors would have been liable?

And, in what does that case differ from the actual facts? In *Fox v. Clifton*, 6 Bingh. 776 (E. C. L. R. vol. 19), 4 M. & P. 676, the fact of the plaintiff being shown by the secretary a book containing the names of the defendants as shareholders and partners in the concern, was held to be no evidence of their having been held out as such by their authority. The resolution here contained mere instructions from the directors to their agent: it never was intended to be communicated to any one. [SHEE, J.—It was passed for the purpose of being acted upon: and it was a direct order to the secretary to advertise.] No doubt: but that must be taken with reference to the previous agreement, that this and all the other preliminary expenses were to be provided for by Payne. He never had authority to pledge the credit of the directors. [BRAMWELL, B.—The Lord Chief Justice seems to think that the transaction amounted to an authority by Marshall and the others to Payne to give the orders for the advertisements upon their responsibility, they looking to him for an indemnity.] The arrangement was, not that Payne should reimburse the directors the preliminary expenses, but that he was to pay them himself.

\**Montagu Chambers*, Q. C. (with whom was *J. Murphy*), [\*840 *contra*.(a)—According to all the cases, beginning with *Reynell v. Lewis* and *Wyld v. Hopkins*, the learned judge would have been wrong if he had withdrawn this case from the jury. The defendant, as one of the directors of this company, not only held out Payne as a person authorized to do all acts usually falling within the scope of a secretary's duty, but, further, he signs the resolution authorizing him to do the very thing which the plaintiffs now seek to be paid for. The defendant is an active party throughout. He now says, that, notwithstanding all that he did and authorized to be done, he is not responsible, because he only consented to act as a director upon Payne's assurance that all the preliminary expenses of setting the concern afloat were to be paid by Payne, and that he did not authorize Payne to show the plaintiffs the resolution directing the insertion of the advertisements. [POLLOCK, C. B.—There is no evidence that Payne was desired not to show the minute-book: and I apprehend the secretary did perfectly right in showing it for any lawful purpose.] The insertion of these advertisements was essential to the launching of the concern: and it is an universal rule, that, if a thing is done for \*the benefit of another, and he knows it has been done, and takes advantage of it, he is responsible for it. Where [\*841 an agent appears to be clothed with a general authority, the principal cannot repudiate his acts because of some secret arrangement qualifying and restricting the apparent general authority. [CROMPTON, J.—That does not quite agree with the doctrine laid down by the

(a) The points marked for argument on the part of the plaintiffs, were as follows:—

"That there was evidence that Payne was authorized to pledge the defendant's credit—that the defendant authorized the performance of the actual work in respect of which the action was brought,—that Payne had at least apparent authority to pledge the defendant's credit,—that there was evidence that the defendant authorized Payne to represent him as ordering the advertisements to be inserted,—that the defendant, by becoming a party to the resolutions, enabled Payne to get credit from the plaintiffs,—and that the private arrangements between Payne and Allan and the directors were not properly admitted in evidence against the plaintiffs."

majority of the Court of Common Pleas in *Jolly v. Rees*, 16 C. B. 628 (E. C. L. R. vol. 81).<sup>(a)</sup>] The authority of a wife seems to stand upon peculiar and perhaps not very accurately-defined grounds. A strong instance of the liability of a principal for the act of his agent, is found in the case of *Hern v. Nichols*, 1 Salk. 289, Holt 462, which is frequently cited. There, in an action on the case for a deceit, the plaintiff set forth that he bought several parcels of silk for ——— silk, whereas it was another kind of silk, and that the defendant, well knowing this deceit, sold it him for ——— silk. On the trial, upon not guilty, it appeared that there was no actual deceit in the defendant, who was the merchant, but that it was in his factor beyond sea: and the doubt was, if this deceit could charge the merchant. And Holt, C. J., was of opinion that the merchant was answerable for the deceit of his factor, though not criminaliter, yet civiliter; for "seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger." Here, the defendant and his co-directors employed Payne, and put a trust and confidence in him: and it is fit that he rather than the plaintiffs should be the loser if that confidence was misplaced. Not only was there evidence of authority in Payne \*842] to do as he did, which it was the duty of the learned \*judge to leave to the jury, but evidence which could lead the jury to no other conclusion than that to which they came. The defendant's own evidence puts him out of court. "The arrangement," he says, "was, that the directors were to be guaranteed against all preliminary expenses by Payne and Allan." What is a guarantee? It is an engagement by a third party to indemnify or hold one harmless if he is called upon to pay. [CROMPTON, J.—It might well have been supposed that the advertisements would not have been inserted on Payne's credit only. CHANNELL, B.—It clearly was a question for the jury. SHEE, J.—And I do not see how they could have come to any other conclusion than they did.]

*Lush* was heard in reply.

POLLOCK, C. B.—It is the opinion of the whole court that the judgment of the Court of Common Pleas must be sustained. We are all clearly of opinion that the resolution, signed by the defendant, which directed the secretary to cause the advertisements to be inserted, could not be excluded from the consideration of the jury. So far as that went, the case is altogether unaffected by the private arrangement between the directors and Payne as to the preliminary expenses. And, even if that was to have any weight, the question must still have been left to the jury. I concur in every one of the reasons given by the judges in the court below. In fact, this was attempting to set up a secret agreement inconsistent with the contract with the plaintiffs for the purpose of binding them. The only question, however, for us, is, whether there was any evidence to go to the jury. We think there was, and on that ground affirm the judgment.

Judgment affirmed.

<sup>(a)</sup> See *Ryan v. Sams*, 12 Q. B. 460 (E. C. L. R. vol. 64), which was not referred to in *Jolly v. Rees*.

# ADDITIONAL CASES

FROM

## CONTEMPORANEOUS REPORTS.

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### IN THE HOUSE OF LORDS.

The Most Honourable the Marquis of SALISBURY, Plaintiff in Error; ROBERTSON GLADSTONE, Defendant in Error.(a)  
*June 11, 17; July 24, 1861.*

In ejectment for a forfeiture, by a lord against a copyholder of inheritance, for digging and taking clay from the manor, to be sold off the manor to any one, the defendant pleaded and proved a custom from time immemorial for the copyholders of inheritance, without license from the lord, to break the surface and dig clay without limit, from and out of their copyhold tenements, for the purpose of making it into bricks to be sold off the manor:

Held (*dub.* Lord Wensleydale), that this custom was good in law.

THE plaintiff in error, who was also plaintiff below, is lord of the manor of West Derby, in the county of Lancaster; the defendant is a copyholder of inheritance of that manor. The plaintiff brought an action of ejectment against the defendant to recover the copyhold lands held by him of the manor of West Derby, as having been forfeited, on account of the defendant having, against the will of the lord, dug and got clay out of his copyhold tenement, made it into bricks, and sold the same off the manor. At the trial of the cause, which took place at Liverpool, on the 12th March, 1859, before Mr. Justice Byles, the defendant produced evidence of an immemorial usage in the manor, for the copyholders of inheritance, without license of the lord, to break the surface, and dig and get clay, without limit, from and out of their copyhold tenements, with the object of being made into bricks, to be afterwards sold by them off the manor, for purposes not connected with the manor. The learned judge told the jurymen, that if the evidence satisfied them of the existence of the usage, in point of fact, from time immemorial, it was sufficient to establish a custom in the manor, to the effect of the usage so proved, and that such custom furnished an answer to the action. The jurors found the custom in fact; and he directed a verdict for the defendant. To this direction the plaintiff excepted, but the exceptions were disallowed by the Court of Exchequer Chamber, and judgment given

(a) 9 H. L. C. 692.

for the defendant. The plaintiff now brought up the judgment to this house.

Sir H. Cairns and Mr. Manisty (Mr. T. Jones was with them), for the plaintiff in error.—It is admitted on the record, that the act complained of is an act of waste, unless it can be defended by the alleged custom. That custom cannot be good; to be so it ought to have four requisites, as stated in the Tanistry Case, Sir J. Davis, Rep. 32, “first, reasonable at its beginning; second, certain, and in no wise ambiguous; third, continuous without interruption; fourth, subject to the prerogative of the King.” Other requisites to constitute a good custom are stated in Broom’s Legal Maxims, pp. 824 to 829, 3d edit. A custom for a customary tenant of a manor which had coal mines lying under the freehold lands of other customary tenants, to get coals, leave them on the lands, not saying how long, and to take away in carts and wagons part, not saying how much of such coals, was held to be bad as being uncertain and unreasonable: *Broadbent v. Wilks*, Willes 360. For the same reason in *Hilton v. Lord Granville*, 5 Q. B. Rep. 701 (E. C. L. R. vol. 31), a custom to dig in mines near the foundations of the plaintiff’s dwelling-house, so as to endanger it, was held to be bad. *Tyson v. Smith*, 9 Ad. & Ell. 406 (E. C. L. R. vol. 36), declared the same principles, and applied them to the custom there set up, and as it appeared in that case to be a reasonable custom it was established. These principles are to be found in the treatises by Lord Coke, *Compleat Copyholder*, s. 33, and by Blackstone, Bk. II. c. 6; and Bracton, 26 a, 209 a, shows that these customs in manors had their beginning *ex conventione*, and therefore must have been reasonable in their origin. The finding here is of a right to take away the clay, without limit, over all the manor, and to sell it at pleasure; such a custom which is in substance to take away the land of the manor itself, and to employ it for purposes wholly unconnected with the manor, is unreasonable, and never could have arisen *ex conventione*. In *Rockey v. Huggens*, Cro. Car. 220, a custom to cut down and sell timber, elms growing upon the copyhold was, upon this principle, held bad, because no sufficient consideration could ever have been given for it. And so in *Badger v. Ford*, 3 B. & Ald. 153 (E. C. L. R. vol. 5), a custom claimed by the lord to grant leases of the waste without restriction was held to be bad, for it amounted to annihilating the waste altogether.

This is, in truth, a claim to take a profit in another’s soil, and is therefore bad. *Wilson v. Willes*, 7 East 121 (though there the turf cut was to be employed on the tenant’s lands within the manor), *Clayton v. Corby*, 5 Q. B. Rep. 415 (E. C. L. R. vol. 45), and *The Attorney-General v. Matthias*, 4 Kay & Joh. 579, were all cases of this sort, and the claim was held incapable of being supported. In *The Dean of Ely v. Warren*, 2 Atk. 189, a custom to cut turf was held good, because it was said, that in marsh lands there might be a good custom to cut turf as a kind of compensation for the long time during which the land was of no profit to the copyholder, which was, in point of fact, putting the validity of the custom entirely upon the ground of its being reasonable.

It is said that a custom for the tenants to work mines is good, but the proposition in that general form cannot be supported; it must be

subject to this restriction, that though such a custom may possibly exist, it can only do so when it has all the incidents of a good custom. In the *Bishop of Winchester v. Knight*, 1 P. Wms. 406, a custom to take away copper ore was set up; it was sent to law to be tried, and the result was unfavourable to the custom. That case has been misunderstood; it has been treated as an authority for saying that a custom for a customary tenant to cut timber might be good; but first, that supposition only arises, not on the words of Lord Cowper, but on the interpretation put upon them, and next that was not a case of mere copyhold, but of customary freehold, where the lord is the mere instrument for passing the land from one tenant to another, but the right to the land is in the tenant himself. In Gilbert's Tenures it is said,<sup>(a)</sup> "it seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines, nor the lord dig in the copyholder's lands, for the great prejudice he would do to the estate." [Lord WENSLEYDALE.—He cannot do it without a special custom; it does not follow that he can do it with any custom.] It does not. In Scriven on Copyholds, 4 edit. 427, it is said, that a copyholder of inheritance, whether for life or years only, has a possessory interest in mines or trees, but that he may have a proprietary right in mines by immemorial custom; but that without such custom, the right of property in the mines is in the lord, and it follows, that in the absence of any particular usage, neither the tenant without the license from the lord, nor the lord without the consent of the tenant, can open and work new mines. That is supported by *Bourne v. Taylor*, 10 East 189, where the lord was held liable to an action for opening mines, unless under a special custom. The case of *Rowe v. Brenton*, 8 B. & C. 737, has no bearing on the point here. That case merely decided<sup>(b)</sup> that where, in each of several manors in the same district, all belonging to the same lord, grants similar in words had been made, evidence of the enjoyment in one manor might be received to show the nature of the rights which the tenants of another were entitled to enjoy. *Hilton v. Lord Granville*, 5 Q. B. Rep. 701 (E. C. L. R. vol. 48), is an important decision. There the custom claimed was a right to work the mines, though injuriously to the surface, paying to the tenants of the surface a reasonable compensation, but nothing was said of compensation for undermining the house; and therefore, though possibly as to the mere surface it might have been good, it was clearly bad with reference to undermining the house. In the judgment the court noticed the case of *Bateson v. Green*, 5 T. R. 411, the language used by Lord Kenyon there, and the criticisms made upon it by Mr. Justice Bayley in *Arlett v. Ellis*, 7 B. & C. 346, and the judgment then goes on,<sup>(c)</sup> "If it must be taken to import that a lord, after granting rights of common, may help himself to any portion of the common land to the exclusion of his grantees, such a doctrine is incompatible with many other cases, and cannot be supported in principle. Assuredly, whatever the lord can reasonably be supposed to have reserved out of his grant, the usage may adequately prove that he did reserve. But a claim destructive of the subject-matter of the grant, cannot be set up by any usage. Even if the grant could be

(a) P. 328, 5 edit. by Watkins 425.

(b) 8 B. & C. 758.

(c) 5 Q. B. 729, 730.

produced *in specie*, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd." The claim there set up for the lord was rejected. That case is all the stronger for the plaintiff here, for there must be some customs which would be good for the lord, who was the original proprietor of the soil, that would not be good for the tenant, who is only his grantee.

There is no analogy between this case and that of one where the tenant claims to cut trees on the copyhold land: trees are but the produce of the land, and may be removed; but here the claim is to take away the land itself. And the custom to cut trees may have had its origin when it was desirable to clear the land, and may be limited to removing the excess. Nor can the case of quarries be referred to as similar to the present, for the custom to take stone from them must be strictly proved; and when evidence of the custom is given, it must be shown to have all the requisites of good custom. Scriven,<sup>(a)</sup> doubts whether any custom to take away gravel and loam from the waste can exist, unless it is shown to be reasonable. And he asserts that for a custom to open a mine or a quarry, there must be the consent of the lord and the copyholder.<sup>(b)</sup> But in neither of these matters has it been shown that there is any authority for the proposition that a custom to take trees, or minerals and stone, without stint, is a good custom; yet that is what is claimed here. The assertion made here, that the clay is the property of the tenant, is a mere piece of reasoning in a circle: it can only be his property if the custom to take the soil, which he insists on, is good; and the question whether the custom is good is in another form—the question whether the clay is his property. We say it is not his property, but that of the lord, and that the claim to take it is a claim to take a profit in another's soil, and cannot be sustained by any mere implication of law. The copyholder cannot prescribe to have by custom a right in the estate of the lord. Without the essential condition of being a reasonable custom, no presumption will be made in its favour. And least of all can such a presumption be made where no apparent consideration has been given for it. *Paddock v. Forrester*, 8 Scott, N. B. 715. [Lord WENSLEYDALE.—Suppose the claim was not to take away the clay, but the earth and soil, and use them for any purpose, would that be a good custom?] It would not. Such a claim cannot be presumed; it must be proved, and proved to have all the essentials of a good custom.

Mr. Rolt and Mr. Edward James (Mr. Mellish and Mr. Baylis were with them), for the defendants in error.—In copyholds of inheritance any right that can be granted or assured by the owner of the soil to the tenant without destroying the estate of the owner, may be established by usage or custom. That is the doctrine for which the defendant contends. [Lord CRANWORTH.—If there was a custom for the tenant to convey by feoffment, would that be bad?] It would, for that would be the destruction of the lord's estate. The lord here has granted an estate in the land, not a mere easement in it. He has merely reserved to himself a reversionary right by escheat; all the rest belongs to the tenant. The taking away of the clay is not the

(a) On Copyholds 522, 4th edit.

(b) Id. 433.

destruction of the tenement; it may be a benefit to it. It is not because a custom diminishes the value of the lord's estate, that it is therefore bad. A tenant may commit waste, for he may cut trees, which is waste, and he may dig for minerals. There is no difference between digging for minerals and digging for clay. The argument on the other side would render the clay valueless; for the lord could not take it because of the tenant's right, nor the tenant take it because of the lord's right. That is a result which the law does not favour, and therefore in *Rutland v. Gie*, 1 Siderf. 152, it was held that a person might open a lead mine on his glebe, for otherwise all the lead mines in the glebe of England would be unproductive. There is no distinction between trees and minerals. Trees are part of the freehold, part of what will escheat to the lord. Clay is in the nature of a mineral.

The *Bishop of Winchester v. Knight* shows distinctly that a tenant might cut timber, and implies that he might dig for ore; and the only issue granted there, was to ascertain whether there was a custom to take the ore, which assumed that there could be such a custom valid in law, the issue being only granted to try the fact. The final judgment proceeded on the fact that no such mines had been before discovered on the land, and therefore there could be no custom as to such mines; but the case showed clearly that if in fact there had been such mines, the law would have recognised the tenant's right to work them.

There is a great distinction between copyholds of inheritance and mere customary copyholds. In the former, the fee is in the tenant; in the latter, it is in the lord. But *Stephenson v. Hill*, 8 Bur. 1273, shows that copyholds of inheritance and customary freeholds are the same, and the lord's interest is merely that of expectancy from escheat.

There is no authority for the argument that the clay may not be taken to be used off the manor. In *Glasscock's Case*, 4 Leon. 236, the custom set up was for the tenants to cut down trees for repairs, and also to sell the trees at their pleasure, and it was adjudged a good custom. A custom may be good, though it does diminish the profits of the lord: *Fawcett v. Lowther*, 2 Ves. 300, 302. And where, as in this case, the copyholder has a proprietary right, the taking of the clay or the minerals would not be a taking in another's soil, for the freehold is really in the tenant. As the whole estate or profit is out of the lord, and nothing remains in him but a mere possibility of escheat, the reasonableness of the custom may be more easily established than if the copyholder was a mere tenant for life: *Cage v. Dod*, Styles 233. The devisee of a copyholder of inheritance, though holding only for life, has been held entitled to cut trees, the devisor being by custom entitled to do so: *Denn v. Johnson*, 10 East 266. And *Curtis v. Daniel*, Id. 273, shows that a tenant may even set up a right against the lord by adverse possession.

Sir *H. Cairns* replied.

Lord CRANWORTH, after stating the case, said:—The argument of the plaintiff was, that no such custom as was claimed here could exist; that it is essential to the validity of a custom that it should be reasonable, and that a custom which would enable the copyholder to remove the whole of the clay off his lands, parcel of the manor,



would be unreasonable, as tending to the destruction or annihilation of those lands.

I cannot attribute much weight to this argument. It is true that a custom to be valid must be reasonable. It is not easy to define the meaning of the word "reasonable" when applied to a custom regulating the relation between a lord and his copyholders. That relation must have had its origin in remote times by agreement between the lord as absolute owner of the whole manor in fee simple, and those whom he was content to allow to occupy portions of it as his tenants at will. The rights of these tenants must have depended, in their origin, entirely on the will of the lord, and it is hard to say how any stipulations regulating such rights can, as between the tenant and the lord, be deemed void, as being unreasonable. *Cujus est dare ejus est disponere*. Whatever restrictions, therefore, or conditions the lord may have imposed, or whatever rights the tenants may have demanded, all were within the competency of the lord to grant, or of the tenants to stipulate for. And if it were possible to show that before the time of legal memory, any lawful arrangement had been actually come to between the lord and his tenants, as to the terms on which the latter should hold their lands, and that arrangement had been afterwards constantly acted on, I do not see how it could ever be treated as being void, because it was unreasonable.

In truth, I believe, that when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom.

Looking, then, to the present case, I find it impossible to say that such a custom as that here alleged might not have resulted from an agreement between the lord and his tenants before the time of legal memory.

This is not, it must be observed, a custom by which any person is affected besides the lord and the particular tenant insisting on it. It is not like the custom pleaded in *Broadbent v. Wilks*, Willes 360, a custom to lay coals to an indefinite extent and for an indefinite time, on the lands of other copyholders, whereby their lands might be made practically useless, although they would still be liable to pay their rents and perform their stipulated services to the lord. Nor is it a custom like that set up by the copyholders in *Wilson v. Willes*, 7 East 121, namely, a custom to take turf in an unlimited quantity from the common for the improvement of their copyhold tenements, under which the rights of the other copyholders in the common might be totally destroyed. Nor is it a custom like that insisted on by the lord in *Hilton v. Lord Granville*, 5 Q. B. Rep. 701 (E. C. L. R. vol. 48), which would have enabled the lord to undermine the houses of the copyholders, and, without any notice to them, to cause their houses to fall and crush those residing in them, and that without making them any compensation. The custom here insisted on is one which affects no one except the lord and the tenant insisting on the custom, and I can see no ground for holding that it was impossible, or even improbable that it might have been the result of arrange-

ments between the lord and his tenants before the time of legal memory.

That such a custom would be good as to copper ore raised and sold by the tenant, was decided by Lord Cowper in the *Bishop of Winchester v. Knight*, 1 P. Wms. 406, for though the tenant there was not strictly a copyholder, yet he was a mere customary tenant, the freehold being in the lord; and in that case, on a bill by the lord for an account of the copper ore raised and sold by the tenant, Lord Cowper directed an issue to try whether there was such a custom as that insisted on, which he could not have done if the alleged custom would be void as being unreasonable. I cannot distinguish that case in principle from the present. It was said that by removing all the clay the land would be rendered unfit for any useful purpose, whereas copper ore might be removed without ultimately damaging the surface. But clay is not the only component part of the soil adapted for profitable cultivation, even if a custom would be bad which would lead to making the land useless for agricultural purposes.

The custom here insisted on is not a general custom for all manors, but only a custom for the particular manor of West Derby; and it may be that in that manor clay was, or was supposed to be present, in so excessive a quantity, that its removal would tend to benefit and not to impoverish the soil. The custom would not warrant the removal of soil consisting of mixed portions of clay, chalk, gravel, and vegetable mould; and it may be that the lord considered that the removal of pure clay would increase the value of the soil which would remain.

I have gone into these particulars, but I by no means think it essential so to do. We may now be unable to discover what were the grounds which led to the establishing of the custom. It is sufficient for me to say that I see nothing to satisfy me that no such grounds could possibly have existed. I therefore think that the direction of the learned judge at the trial was right, that the exceptions were properly disallowed, and that your Lordships' judgment ought to be for the defendant in error.

My Lord Brougham,<sup>(a)</sup> who is unable to attend to-day, has given me authority to say that he entirely concurs with the majority of your Lordships, and that he thinks that the judgment of the court below is right.

LORD WENSLEYDALE.—My Lords, the very able argument of Sir Hugh Cairns at your Lordships' bar, when this case was heard a few weeks ago, I must own, impressed me very strongly, and produced a great doubt as to the soundness of the decision by the Judges in the Court of Exchequer Chamber, which has not been entirely removed by the arguments on the other side at the Bar.

The question is whether a custom in the manor of West Derby was good in law, for the copyholders of inheritance of the said manor to break the surface, whatever that surface might be, and whether clay formed a part of the upper surface or the whole of it or not (for the direction of the learned Judge contains no qualification or limit), and to dig and get clay without limit in and upon and from and out of

<sup>(a)</sup> His Lordship had presided at the hearing.

their copyhold tenements, parcel of the manor, for the purpose of making the clay into bricks to be afterwards sold by them off the manor for purposes not connected with it. The question is, whether this is not an unreasonable custom, and if so the judgment ought to be for the plaintiff, for no custom which is unreasonable can be supported.

There is no doubt whatever but that the lord, being the owner of the soil originally, could have given by express grant such a power, and even a much larger power, to his tenants; but then when there is no express grant, but one which is sought to be implied by usage, as a custom is, it is a condition required by law, that the custom should not be unreasonable; otherwise the prevalence of the use is to be referred to the ignorance or carelessness of those whose property is affected by its exercise, rather than to a grant.

Thus there is no question but that the custom for a copyholder to take an unlimited quantity of turf from the lord's waste for the improvement of his copyhold tenement is unreasonable and void: *Wilson v. Willes*, 7 East 121. So a custom for the lord to enclose generally, without leaving a sufficiency of common, is void: *Arlett v. Ellis*, 7 B. & C. 346 (E. C. L. R. vol. 14). Yet in these cases, and in many others, the lord might, without doubt, have made a valid grant in the one case, or reserved a valid right in the other. So unquestionably the lord might grant a right to each copyholder to remove the surface, and take away the whole stratum of clay, however deep and extensive it might be, and however much injury its removal might cause to the copyhold tenement, even though there was no countervailing benefit by its removal to that particular tenement or any tenement in the manor, either directly or indirectly, by the use of the bricks manufactured from the clay. Where a right is claimed by a copyhold tenant on the adjoining land of the lord, or on the land of the lord which he himself enjoys under a grant from the lord, the right is equally claimed by custom, and is equally void if the custom is unreasonable, as it would be equally valid if it had been made the subject of an express grant.

The question therefore seems to me to come to this. Is it an unreasonable thing for a copyhold tenant to have a right to destroy the natural surface of the soil, and remove it altogether, leaving the substratum under it, sand or stone, or whatever it may happen to be, which may be incapable of cultivation, exposed below?

This differs very considerably from the right to cut trees, which may be highly beneficial in the proper course of husbandry, for many reasons, and which might be replaced by others in particular soils; or the right to get minerals, which may be generally exercised without much injury to the surface.

I confess that I still entertain much doubt upon this question; but as my noble and learned friend who has preceded me, and my noble and learned friend who will follow me, are of opinion that the custom proved is valid, and my noble and learned friend the Lord Chancellor, as well as Lord Brougham, formed a very decided opinion upon the validity of the custom proved, I certainly do not mean to offer any advice to your Lordships that the judgment of the Court of Exchequer Chamber should be reversed.

Lord CHELMSFORD.—My Lords, the immemorial usage of the alleged right in the terms stated has been fully established by evidence.

It was insisted on behalf of the lord that the custom must be bad, because from the original infirmity of a copyholder's estate it was not to be presumed that a convention should have been entered into between the lord and his tenant to permit the tenant to destroy the copyhold by taking away the lord's soil. The copyholder, it was said, had merely the possession or usufruct of the land, the freehold and dominion being in the lord. It was admitted that there might be a valid custom for a copyholder of inheritance to work mines, to dig and take clay, or to cut down and carry away trees, but that it was the extent to which this custom was alleged which made it unreasonable; and with respect to trees it was said that although it must be conceded that a custom to cut down all trees growing on the copyhold tenement might be good, a distinction must be drawn between them and such an interference with the soil, as the removal of clay or minerals, because it might be necessary to clear away trees for the purpose of cultivation, or because they are perishable, or are in their nature renewable. The last reason, however, involves an inaccuracy, for the trees themselves are not renewable, but fresh trees may be planted to supply the place of those which are cut down, and the other two reasons might support the distinction, if the custom were confined to the suggested occasions; but evidently they will not afford a satisfactory explanation of a custom to cut down all trees, and to dispose of them at the will and pleasure of the tenant.

In the course of the argument, I asked if the custom to take clay or to work mines might lawfully exist (as it was admitted it might), in what manner such a custom would be likely to have originated, and whether, assuming that copyholds sprang from tenure in pure villenage, it was at all unreasonable to suppose that the lord, in consideration of the performance by the tenant of the villein services connected with his tenure, might give the tenant the right to take away for his own benefit a portion of the lord's soil within the tenement. To this it was answered, that this might be so to a defined and limited extent, but that the custom here claimed went to the entire destruction of the copyhold tenement. It is difficult to understand in what sense a custom to take the whole of a particular description of soil from the tenement can be called a destruction of the copyhold tenement itself. The tenement remains, although this portion of the soil may be exhausted. And there seems to be nothing unreasonable in supposing that the lord may originally have licensed his tenants to use their copyhold tenements in the way in which alone perhaps any great benefit could be derived from them.

It is not easy to suggest a distinction between a custom to work mines and a custom to dig clay for the profit and advantage of the tenant. There can be no doubt as to the validity of the custom with respect to mines. The Bishop of Winchester v. Knight, 1 P. Wms. 406, was a case in which the freehold of the customary tenants was in the lord, the only difference between the tenure of these tenements and of copyholds being that they were not held *ad voluntatem domini*. If, then, there could have been no valid custom for such tenants to

open a new mine, and dispose of the minerals for their own benefit, Lord Cowper would not have sent the case to law to have the question of the custom determined.

The cases which have been decided upon the right to profits *à prendre in alieno solo*, have no very close application. Although, in one sense, the soil of the copyhold tenement is in the lord, this is true only to a qualified and limited degree, and does not imply complete ownership. The lord cannot, any more than the copyholder, work mines in the tenement, or cut down trees upon it, without a custom authorizing him to do so. There is of course the distinction pointed out in the argument between custom applicable to the lord and one that is applicable to the tenant. The rights of the tenant could have been acquired only by grant or license from the lord. The rights of the lord over the copyhold tenement must have arisen from reservations for his own benefit, made by the absolute owner of the property, who had power to transfer it with such qualifications as he pleased. He might reserve to himself upon the original grant or license, any right which would not be totally inconsistent and incompatible with the existence of the interest granted.

Thus, in *Bateson v. Green*, 5 T. R. 411, the validity of a custom for the lord to dig clay pits on the waste to any extent, and without leaving sufficient herbage, was established, because there was nothing unreasonable in supposing that the original grant of the common was expressly made subservient to the exercise of the lord's right to take away the soil from his own lands.

But in *Broadbent v. Wilks*, Willes 360, 1 Wils. 63, a custom for the lord, the owner of coal mines within the manor, to dig the mines, and lay the rubbish in heaps near the pits, upon the surface of land being customary tenements and parcel of the manor, there to remain and continue at the will and pleasure of the lord, was held bad because the right which was claimed involved the destruction of the whole profits of the land, and it would, therefore, be unreasonable to presume a reservation so entirely inconsistent with the grant of the tenements.

On the other hand, with respect to rights conferred upon tenants, there is nothing unreasonable in supposing that the lord should have authorized the tenant to appropriate portions of the soil of the tenement to his own use, as the trees, or the minerals, or the clay, but it is most unlikely that he should have given to his tenants in general rights or privileges, and at the same time have left it in the power of any one or more of them to destroy the subject upon which these rights and privileges were to be exercised and enjoyed. Thus, in *Wilson v. Willes*, 7 East 121, a custom for all the customary tenants of a manor having gardens, parcels of their estates, to take pasturable turf, at all times when necessary and in unlimited quantity, from a waste within the manor, for making and repairing grass plots in their gardens, for the improvement thereof, and for making and repairing the banks and mounds of the hedges and fences of the customary estates, was held bad, as being indefinite, uncertain, and destructive of the common.

These cases show the extent to which customs, with respect to the soil of copyhold tenements, may be carried; and although they do not define very distinctly the limits of reasonableness, yet they indicate the principle upon which the unreasonableness of any custom

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may be ascertained. There can be no doubt, that the lord, upon the original grant of the copyhold tenements in question, might have reserved to himself the right to dig and carry away the brick-earth found upon them, and that if a custom of this kind existed in the manor, it would be reasonable and valid. But if the lord might have reserved such a right to himself, why might he not confer it upon his tenants?—And if it is not unreasonable to suppose that such a right might have been originally conferred, then the custom, which has been proved by the immemorial exercise of the right, is good in law, and the judgment in favour of the defendant in error ought to be affirmed.

Judgment for defendant in error, with costs.  
Lords' Journals, 24th July 1861.

# INDEX

OF

## THE PRINCIPAL MATTERS.

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(The additional case in this volume is indexed in [ ].)

**ABSTRACT OF TITLE**,—See **VENDOR AND PURCHASER**.

**ACCIDENTAL DEATH**,—See **INSURANCE**, 5.

**ADMIRALTY**.

*Sentence of a Foreign Prize Court, how far conclusive*,—See **INSURANCE**, 6-12.

**AGENT**,—See **PRINCIPAL AND AGENT**. **JOINT-STOCK COMPANY**.

**AGREEMENT**,—See **CONTRACT**. **EVIDENCE**.

**ALE-HOUSE**.

*Refreshment for Travellers*.

1. Persons walking from their residences in a town to enjoy the country air on a Sunday morning, and in the course of such walk resorting to an inn for refreshment, are "travellers" within the exception in the 11 & 12 Vict. c. 49, s. 1, although the inn be within two miles of their place of abode, provided they do not go abroad for the mere purpose of indulging a propensity for drink. *Taylor, app., Humphries, resp.*, 539.

2. And, as the exception of "refreshment for travellers" is contained in the clause creating the prohibition, the burthen of showing that the prohibition has been infringed, and that the case is not within the exception, is cast upon the informer: and, if the inn-keeper believes, and has reason to believe (of which the magistrates are the judges), when he supplies the liquor, that he is supplying refreshment for a "traveller," he ought not to be convicted. *Ib.*

**APPEAL**,—See **BAIL**.

*Bail on Appeal to the Exchequer Chamber*.

A judge at Chambers having in the exercise of his discretion dispensed with bail on appeal, on the ground that the question to be determined was a doubtful one, and had been decided by the court in deference to a single authority,—the Court refused to set aside his order. *Turquand v. Moss*, 24.

**APPORTIONMENT**,—See **LANDLORD AND TENANT**, 2, 3.

**ARBITRAMENT**.

*Authority of Arbitrator*.

Held,—reversing the judgment of the Court of Common Pleas,—that a party who attends before an arbitrator under protest, cross-examines his adversary's witnesses, and calls witnesses on his own behalf, does not thereby preclude himself from afterwards objecting that the arbitrator was proceeding without authority. *Ringland v. Lowndes*, 514.

**ARRANGEMENT**.

*Deeds of*,—See **BANKRUPT**, 1-7.

**ASSIGNS**,—See **GRANT**.

**ASSURANCE**,—See **INSURANCE**.

**ATTORNEY.***Undertaking by.*

1. After the issuing of a writ, the attorney gave the plaintiff the following memorandum,—“I undertake to carry on this action on having cash provided for costs out of pocket, such costs not to exceed 15*l.*, including counsel's fee; not any witnesses' expenses:” —Held, that this was an engagement on the part of the attorney not in any event to charge the client more than 15*l.* *Moon v. Hall*, 760.

*Action against, for Negligence.*

2. An attorney is not liable to an action for negligence at the suit of one between whom and himself the relation of attorney and client does not exist, for giving, in answer to a casual inquiry, erroneous information as to the contents of a deed. *Fisk v. Kelly*, 194.

3. A., B., and C., were employed in a manufacture in which secrecy was essential: and, to insure their fidelity, they were required to execute deeds under which a portion of their wages was to be invested in the name of a trustee, with a stipulation for determining the engagement on giving two months' notice, at the expiration of which, in the cases of B. and C., the money so invested was to be paid over to them, but, in the case of A., the deed was so framed as to make it payable only to his executors upon his death. D., the attorney for the employers, being upon the premises, was asked by A. if he would receive his money if he gave notice to quit the service; whereupon D. (not recollecting that A.'s deed differed in this respect from those of B. and C., though he himself drew them all, and had them in his custody), answered in the affirmative. Upon receiving this information, A. gave notice, but afterwards discovered that the money invested for him could only be paid to his executors:—Held, that A. could not maintain an action for the loss and disappointment sustained by him in consequence of his acting upon this mistake on the part of D. *Ib.*

*Striking off the Roll.*

4. The court will not strike an attorney off the rolls, where he has become bankrupt having moneys of a client in his hands which ought to have been paid over, unless a clear case of fraudulent misappropriation be made out against him. *In re Sparks*, 727.

**BAIL.**

*On Appeal*.—See **APPEAL**.

**BANKRUPT.**

*Compromise under 12 & 13 Vict. c. 106, s. 211 et seq.*

1. M., a trader, on the 31st of August, 1860, petitioned the Court of Bankruptcy for protection under the 211th section of the Bankrupt Law Consolidation Act, 1849, and a sitting was duly appointed pursuant to ss. 213, 215, and a proposal for compromise made by the debtor pursuant to s. 214.

The first sitting, which was held on the 26th of September, 1860, was adjourned to the 4th of October, and there was a further adjournment to the 25th of October, when the commissioner, on the application of the plaintiff's solicitors, adjudged M. a bankrupt, and adjourned his petition and all further proceedings thereunder into the public court. M. appealed against this decision, and on the 31st of January, 1861, the Lords Justices reversed it, and remitted the case to the commissioner for further consideration. The commissioner thereupon ordered the first sitting under the petition to be adjourned to the 18th of March, 1861, and that any further modification of the proposal be made and filed ten days before the day so appointed. On the 28th of February, M. accordingly filed a modified proposal to pay his creditors a composition of 10*s.* in the pound, by four instalments,—the first, of 4*s.* in the pound, to be paid in cash within seven days after confirmation by the court of any resolution agreed to by the creditors,—the second, of 2*s.* in the pound, on the 1st of June, 1861,—the third, of 2*s.* in the pound, on the 1st of December, 1861,—and the 4th, of 2*s.* in the pound, on the 1st of March, 1862; the three last instalments to be secured by the promissory notes of M., and to be guaranteed by A. and B. by their bond to the official assignee as trustee for the creditors; and the promissory notes to be ready for delivery to the creditors respectively within ten days after such modified proposal should have been agreed to and confirmed.

At the meeting of the 18th of March, 1861, the modified proposal was assented to by the required number of creditors who had proved, and a sitting appointed for the 3d of April, for its confirmation.

On the 8th of March, 1862,—the arrangement having been completely carried out by the payment of all the instalments,—M. obtained from the Court of Bankruptcy a certificate pursuant to the 221st section of the Bankrupt Law Consolidation Act, 1849:—

Held, that the certificate was not conclusive; but that it was competent to a creditor to show that the arrangement had not been duly carried into effect and the creditors satisfied. *Naylor v. Mortimore*, 207.



**BANKRUPT.**

*Compromise under 12 & 13 Vict. c. 106, s. 211 et seq. (continued).*

2. Many of the creditors were paid the full amount of the composition at once in cash, but some of them not strictly within the seven days limited by the modified proposal: all the rest of the creditors (except the plaintiffs, to whom the cash and promissory notes were duly tendered, but who refused to receive them) were paid the first instalment in cash, and received the notes for the other instalments in due course:—Held, that it was not competent to the plaintiffs to object to the mode in which the arrangement had been carried out quoad the other creditors. *Naylor v. Mortimore*, 207.

3. The condition of the bond contained a stipulation by which it was to be void if the promissory notes should be ready for delivery to the creditors within the period limited, and if the second, third, and fourth instalments of the composition should be duly paid, or "if before any default should be made in payment of the said instalments or any of them, or any part thereof, M. should be adjudged a bankrupt in respect of any debt proved or provable under the said petition so filed by him as aforesaid:—"Held, that the introduction of the latter stipulation did not vitiate the bond. *Ib.*

4. Certain of M.'s creditors were public unincorporated companies and banking companies incorporated under the 7 G. 4, c. 46, or the 7 & 8 Vict. c. 113. These creditors were represented at the meetings, and assented to the resolution, by a person who acted for them under powers of attorney (not under seal) respectively executed by their managers, secretaries, or public officers, respectively, who did not appear to be authorized *under seal* to grant such powers of attorney, or otherwise than by virtue of their being such managers, &c.; but the respective banks which they represented had ratified their acts by receiving the composition:—Held, that the assents were properly given, and that, at all events, it did not lie in the mouths of the plaintiffs to make the objection. *Ib.*

5. Held also, that the proceedings were properly continued by the commissioner after the petition had been remitted to him by the Lords Justices. *Ib.*

6. The plaintiffs (who were the holders of three bills of exchange accepted by M. amounting to 3314*l.* 19*s.*), for the purpose of putting themselves in a position to oppose the petition, at the first sitting, on the 26th of September, 1860, proved their debt. On the 7th of March, 1861, they commenced actions against M. upon these bills, and obtained judgments in those actions respectively on the 25th of March and 4th of April, 1861: and on the 25th of April, 1861, they brought an action upon those judgments:—Held, that the certificate, being a bar to the original debts, was equally a bar to the action upon the judgments. *Ib.*

*Deeds of Arrangement.*

7. Held,—upon the authority of *Ex parte Godden*, *In re Shettle*, 1 De Gex, Jones & Smith 260,—that, in the schedule of creditors assenting to or dissenting from a composition under the 192d section of the Bankruptcy Act, 1861, filed in pursuance of the general order in bankruptcy of the 22d of May, 1862, the names and the amount of the debts of all the creditors must appear, whether secured (wholly or in part) or unsecured. *Turgand v. Moss*, 15.

*Debts provable.*

8. *Contingent liability under 12 & 13 Vict. c. 106, s. 178.*—Bankruptcy and certificate are no bar to an action for a call in respect of shares held by the defendant in a joint-stock company, registered under the Joint Stock Companies Acts, 1856 and 1857, made after the adjudication,—the liability in respect of such call not being a liability at the time of the filing of the petition "to pay money on a contingency," within the 178th section of the Bankrupt Law Consolidation Act, 1849. *The General Discount Company v. Stokes*, 765.

9. *Contingent liability under 24 & 25 Vict. c. 134, s. 154.*—The 154th section of the Bankruptcy Act, 1861, discharges the bankrupt from liability to a surety in respect of payments of premiums on a policy of insurance becoming due subsequently to the date of the adjudication. *Saunders v. Best*, 731.

**BETTING-HOUSES.**

*Construction of 16 & 17 Vict. c. 119, s. 1.*

Held, that the habitual use of a spot in a public park for the receiving of deposits, to return a larger sum on the contingency of a particular horse winning a race, is the using of "a place" for such purpose, within the prohibition of the 16 & 17 Vict. c. 119, and consequently that the money so deposited might be recovered back by virtue of s. 5 of that act. [Reversed on error.] *Doggett v. Catterne*, 669.

**BILL OF LADING.**—See **SHIPPING**, 1, 2.

## BILL OF SALE.

*Form of.*

1. A bill of sale was executed by A. to B., but the person who was really interested in the goods was C., who advanced the money, but whose name did not appear either in the bill of sale or in the affidavit filed therewith:—Held, that, though B. might be treated in equity as a mere trustee, there was no trust which need under ss. 2 and 3 of the Bills of Sale Act, 17 & 18 Vict. c. 36, appear upon the face of the instrument. *Robinson v. Collingwood*, 777.

*Construction of.*

2. Entry is not necessary to the vesting of a term of years in the lessee: but for the purpose of maintaining an action of trespass, the lessee must enter, since that action is founded on the actual possession. *Harrison v. Blackburn*, 678.

3. By a deed, reciting that A. was indebted to B. in the sum of 60*l.* for goods supplied, A. assigned to B. "all and every the household goods and furniture, stock in trade, and other household effects whatsoever, and all other goods, chattels and effects now being, or which shall hereafter be, in, upon, or about the messuage or dwelling-house and premises occupied by A., and known as the Bull's Head, situate, &c., and all other the personal estate whatsoever of or to which the said A. is now and from time to time and at all times hereafter (so long as any money shall remain due to B.), and all the estate of A. in, to, or upon the premises hereby assigned or intended so to be," absolutely. Then followed a power to B. to sell and dispose of "the same premises," and out of the proceeds to pay the 60*l.* and expenses, and to render the surplus to A.:—

Held, that, notwithstanding the general words, the deed (which was registered under the Bills of Sale Act, 17 & 18 Vict. c. 36) did not pass to B. the term which A. had in the Bull's Head. *Id.*

And see MORTGAGE.

CERTIFICATE,—See COSTS, 2.

CHARTER-PARTY,—See SHIPPING, 3, 4.

COLLISION,—See SHIPPING, 7.

## COLNE FISHERY ACT.

*Construction of.*

The corporation of Colchester having in 1740 become suspended by reason of certain proceedings on quo warranto in the Court of King's Bench, an act of 81 G. 2, c. 71, was passed for amongst other things, preserving the Colne Fishery which had been by ancient charters vested in them. By that act,—after reciting the charters and letters-patent of incorporation, "that the said mayor and commonalty, and their predecessors, had for time immemorial, as well by virtue of their prescriptive rights, as of the said letters-patent, granted licenses to oyster-dredgers to dredge and take oysters in the said fishery," and had held courts and made rules and orders for governing and preserving the fishery, and that, by reason of the judgments of the Court of King's Bench, there remained no mayor, aldermen, or justices of peace, nor any person or persons to hold courts or make or enforce rules for the government and preservation of the fishery,—it was enacted, that, from and after the passing of that act, it should be lawful to and for the justices residing within the borough or within the Colchester division of the county of Essex, and they were thereby required, to hold courts, appoint officers, "and grant licenses to such oyster-dredgers as should apply for the same, under the usual and accustomed payments and fees, and in such manner as the said mayor and commonalty, or their predecessors, had theretofore used to grant such licenses," &c. By s. 2, a penalty of 5*l.* was imposed upon non-licensed persons dredging in the fishery. By s. 4, the payments and fees for licenses, and all fines, were to be paid to the justices, and, after the reincorporation of the borough, to the chief magistrate thereof, &c., and be applied in the first place in payment of the necessary charges of obtaining the act, and then to the assignees of a mortgage on the estates of the late mayor and commonalty. And by s. 5, it was provided, enacted, and declared, that "the powers and authorities thereby given to the justices should continue and be in force only and until his Majesty, his heirs or successors, should please to reincorporate the said borough; and that, from such incorporation, all the powers and authorities thereby vested in the said justices should cease to be in such justices, and should from thenceforth be and remain in such body corporate, for the uses aforesaid; and that all the other powers, matters, and things thereby enacted, should stand ratified and confirmed to such corporation."

In 1763, by charter of 3 G. 3, the borough was reincorporated.

In an action against the new corporation for refusing to grant a dredging license to the plaintiff, the declaration averred that the plaintiff, before and at the time of his apply-

**COLNE FISHERY ACT.***Construction of (continued).*

ing for such license, was, and thence hitherto had been and was, an oyster-dredgerman qualified and entitled to apply for, demand, and have a license from the defendants under the said act of parliament, to dredge and take oysters in the said fishery under the usual and accustomed payments and fees; that he claimed at the proper court to be licensed; and that, although all conditions precedent to entitle him to such license had been performed, &c., the defendants refused to license him:—

Held, on demurrer, that, whatever the immemorial custom might be, there was nothing in the act of parliament which imposed upon the corporation the duty or obligation of granting licenses for any accustomed payment or fee; and consequently that the declaration was bad. *Mills v. The Mayor, &c., of Colchester*, 634.

**COMMON LAW PROCEDURE ACT, 1852.**

Section 13. *Writ for Service abroad*.—See PRACTICE, 1.

**COMMON LAW PROCEDURE ACT, 1854.**

Section 50. *Inspection of Documents*.—See PRACTICE, 2.

**COMPOSITION**.—See BANKRUPT, 1-6.**COMPOSITION DEED.***Illegal Preference.*

A., being about to compound with his creditors, in order to induce B. (one of them) to execute the deed, without the knowledge of the other creditors gave him two promissory notes for 25*l.* each beyond the amount of the composition. Upon the first of these becoming due it was dishonoured, and an action was brought upon it, and judgment obtained and execution issued. C., who was a party to the notes, in consideration of A.'s forbearing to enforce the judgment, gave him a guarantee for the amount of the judgment and the outstanding note; and thereupon the two notes were given up:—Held, that the guarantee was tainted with the original fraud, and therefore could not be enforced, notwithstanding part of the consideration for it was the giving up a judgment in an action in which the illegality might have been but was not pleaded. *Clay v. Ray*, 158.

**CONCEALMENT**.—See PRINCIPAL AND AGENT.**CONDITION PRECEDENT**.—See INSURANCE, 4.**CONTINGENT LIABILITY**.—See BANKRUPT, 8, 9.**CONTRABAND OF WAR**.—See INSURANCE, 6-12.**CONTRACT.***Construction of.*

1. The defendants being employed as agents for the plaintiffs (a foreign company) to negotiate sales of candles for them in this country, conveyed to them an order from one S. for 2500 cases, to be delivered in London "free on board export ship: 2½ per cent. discount against bill at three days' sight: goods, invoice, and draft for acceptance to be sent to us." The plaintiffs did not in terms accept this proposal, but wrote to the defendants on the 19th of June as follows,—"Les informations sur S. sont telles que nous ne pouvons lui livrer les 2500 caisses que contre *connaissance*. Si vous voulez, nous vous enverrons les *connaissances*, et vous ne les lui délivrerez que contre *payement*." The defendants informed S. that the plaintiffs accepted the order on condition that he handed them (the defendants) a check in exchange for the bill of lading; and to this S. assented, provided he was allowed a discount of 3 per cent. instead of 2½, to which the plaintiffs agreed. On the arrival of the goods in London, the defendants caused them to be transhipped on board a vessel called the *Laurel* (named by S.) bound for Melbourne, taking the mate's receipt in their own names. They afterwards tendered that document to S. and demanded payment, which he promised to make on the following Saturday. S., however, failed to pay according to his promise, and the *Laurel* sailed to Melbourne with the goods on board.

Under the instruction of the judge, the jury found that the meaning of the plaintiffs' letter of the 19th of June was, that the defendants were not to part with the goods out of their possession or control, until they had received the price thereof from S.:—

Held, that the conduct of the defendants amounted to a breach of their contract with the plaintiffs; that there was no misdirection; and that the proper measure of damages was the value of the goods. *The Stearine Kaaron Fabriek Gonda Company v. Heintzmann*, 56.

## CONTRACT.

*Construction of (continued).*

2. Where a contract is to be made out partly by written documents and partly by parol evidence, the whole becomes a question for the jury. *Bolckow v. Seymour*, 107.

3. A. having entered into a contract for the supply of iron rails for Vera Cruz, applied to B. & Co., shipowners and brokers, to procure vessels to carry it thither; whereupon B. & Co. on the 19th of November wrote to A.,—"We hereby engage to find tonnage for about 5000 tons of rails to load at M. for Vera Cruz, subject to the following conditions, viz., 1000 tons to be delivered at Vera Cruz in three months from this time, and 1000 tons per month afterwards," &c. After a long correspondence and several interviews as to the class of vessels to be chartered, and the flag, B. & Co. on the 11th of December wrote to A. as follows,—"Our engagement to procure tonnage for Vera Cruz is the letter addressed to your Mr. B. on the 19th November; and, in accordance therewith, we are arranging to take up vessels for the first shipment of 1000 tons. We cannot restrict ourselves to vessels of any particular flag or class, but will of course give a preference to neutral ships of high class." On the 15th of December B. & Co. wrote to A. saying that they would prefer abandoning the contract altogether. And afterwards on the same day A. wrote,—"We accept your offer of the 19th November last, coupled with the initialled offer of the 18th. Messrs. B. hold us to our contract, and therefore we must hold you to yours, and cannot consent to your abandoning it, as intimated."—

Held, that these letters did not constitute a complete contract, but that recourse must be had to parol evidence; and, consequently, that it was properly left to the jury to say whether or not a binding contract as alleged in the declaration was to be inferred from the whole. *Ib.*

4. The defendant authorized his brokers by letter to buy for him a cargo of bone-ash at a certain price per ton,—"on a basis of 70 per cent. mean of two London chemists: usual London terms, viz., cash in twenty-eight days, less 2½ per cent." This offer was communicated by the defendant's brokers to the sellers' brokers by letter as follows,—"We can take the cargo at, &c., cash in twenty-eight days from last day of landing, less 2½ per cent.: to be analyzed by two London chemists." The sellers accepted the offer, and sent a bought-note to the buyer's brokers, describing the terms of payment thus,—"Payment, cash before delivery, allowing a discount of 2½ per cent. equal to cash in Liverpool within twenty-eight days from last day of landing."—Held, that there was no substantial difference between the offer and the acceptance, and consequently that there was a binding contract between the parties. *Heyworth v. Knight*, 298.

5. Where a complete contract (through brokers) for the sale of goods is to be gathered from a written offer on the one side and a written acceptance on the other, such contract is not the less binding on the buyer because bought and sold-notes are subsequently exchanged between the brokers, containing terms not warranted by the authority given to the buyer's broker,—at all events, in the absence of evidence of a custom in the particular trade to contract by bought and sold-notes, or of a distinct understanding between the parties to that effect. *Ib.*

6. Remarks upon *Cowie v. Remfry*, 5 Moore's P. C. 232. *Ib.*

7. H. & Sons being engaged, under a contract in writing, in the erection of certain engineers' work for N., for which iron and brass castings were required, and Hill, the founder from whom the castings were procured, having a claim against H. & Sons to the amount of 218*l.* for goods already supplied, and refusing to continue the supply without obtaining payment or security for that sum, N. consented to give Hill a guarantee in the following terms:—"May 22, 1861. Mr. J. N. agrees to pay to Mrs. Hill, iron-founder, on H. & Son's account, the sum of 218*l.*, being the amount owing to her by them, together with interest, in six months from the above date, providing he has work done as security for the same."

In an action by the representatives of Hill against N. upon this guarantee:—Held, that it was a condition of N.'s liability thereon, that, at the end of the six months, work should have been done by H. & Sons for him in respect of which a debt should be due from him to them; and that the plaintiffs could not recover without producing the contract between H. & Sons and N. under which the work was done. *Hill v. Nuttall*, 262.

8. To induce Hill to go on with the castings in the meantime, the following memorandum was drawn up and signed by her, by H. & Sons, and by N.,—"May 22, 1861. M. Hill agrees to make and deliver casting required for N.'s shed, as usual, and N. to pay for the same in monthly payments on H. & Sons' account."—Held, that the representatives of Mrs. Hill were entitled to recover from N. the price of castings delivered to H. & Sons under this agreement, without showing that they were used by them in the works done for N. *Ib.*

9. The plaintiff was retained, by resolution of the directors of a public company, as broker, to dispose of the shares therein, upon the terms that he was to receive 100*l.* down, O. B. N. S., VOL. XVII.—83

**CONTRACT.**

*Construction of (continued).*

and 400*l.* more when all the shares should have been allotted. By the act of the directors without any default on the part of the plaintiff, the company was wound up before the whole of the shares had been disposed of:—Held, that the plaintiff was entitled to recover as damages for the breach of contract such sum as a jury (or the court substituted for a jury) should think reasonable. *Inchbald v. The Western Neigherry Coffee, &c., Plantation Company*, 733.

And see **VENDOR AND PURCHASER.**

**CONVERSION**,—See **DAMAGES**, 1-3.

**CONVEYANCE.**

*Parties*,—See **MORTGAGE.**

**COPYHOLD.**

*Grants by the Lord to himself.*

The Dean and Chapter of Christchurch, Oxford, the owners of the manor of Maids-morton, in Bucks, had from the year 1710 been in the habit of granting leases of the manor, and of renewing them from time to time. By one of these leases, which was made to Richard Grenville, then Duke of Buckingham, in 1828, the manor, with all lands, tenements, rents, reversions, and services thereunto belonging or appertaining, together with the keeping and profits of the courts and leets, with all wards, marriages, reliefs, &c. (except and reserved to the Dean and Chapter all the rents of the freeholders of the manor and all timber-trees),—were demised to the Duke, his executors and administrators, from the 10th of October, 1828, for twenty-one years, subject to the payment of the money and corn-rents therein mentioned; with a proviso against alienation of the demised premises without the previously obtained consent of the Dean and Chapter.

By indenture of the 1st of August, 1833, the said Richard Grenville, Duke of Buckingham, assigned to trustees, upon certain trusts, all the manors, messuages, lands, tenements, tithes, and other hereditaments of or to which he was absolutely possessed or entitled at law or in equity for any term or terms of years beneficially, and not as mortgagee or trustee.

On the 18th of December, 1833,—the first seven years of the before-mentioned lease of the manor having then expired,—a new lease of the manor in the same terms was granted by the Dean and Chapter to the Duke (Richard Grenville) for twenty-one years from Michaelmas, 1833.

In January, 1839, the Duke (Richard Grenville) died, having by his will devised all his real and personal estate to his son, appointing him his sole executor.

On the 26th of January, 1842, the Dean and Chapter granted a fresh lease of the manor to Richard Plantagenet, the then Duke, for twenty-one years from Lady Day, 1841, in the same terms as the former leases.

In neither of the leases of 1833 and 1842 was any mention made of the deed of the 1st of August, 1833; nor was any license to alienate applied for; nor was the deed ever notified to the Dean and Chapter until March, 1863.

At a special court baron of the late Duke (Richard Grenville) described as "farmer of the Dean and Chapter of Christchurch, and lord of the said manor," on the 29th of April, 1836, one Hearn was admitted to a copyhold tenement of the manor for three lives, on payment of 27*5*l.**

At a court held on the 2d of April, 1840, it was presented that Hearn had, out of court, in consideration of 800*l.*, surrendered the copyhold to which he had been admitted in 1836, to the use of the then Duke (Richard Plantagenet), his heirs and assigns, and the Duke was thereupon admitted tenant, to hold the same tenement to the use of himself, his heirs and assigns, during the three lives and the life of the survivor: and, at a court held on the 9th of May, 1845, one of the lives having dropped, the then Duke, as lord of the manor, granted the same tenement to himself, his heirs and assigns, for the life of his son, the now Duke.

At a court held on the 3d of July, 1840, the persons for whose lives a certain copyhold tenement had been granted in 1800 and 1811 being all dead, the Duke granted the same tenement to himself for the life of himself and the lives of his son (the now Duke) and of his sister (Lady Anna Eliza Grenville), and the life of the survivor of them.

At a court held on the 11th of November, 1811, the then lord granted a copyhold tenement to Richard Grenville (then Earl Temple), Richard Plantagenet (then Viscount Cobham), and Lady Mary Arundell, for their lives and the life of the survivor.

At a special court held by the then Duke, Richard Plantagenet, on the 8th of July, 1840, the death of the late Duke was presented, and thereupon the same tenement was

**COPYHOLD.**

*Grants by the Lord to Himself (continued).*

granted to Richard Plantagenet, his heirs and assigns, during the life of the defendant, then Marquis of Chandos. There was a similar grant at a court held on the 9th of May, 1845, on the death of Lady Mary Arundell.

Richard Plantagenet, Duke of Buckingham, died on the 29th of July, 1861, and all such interest as he had in the property in question vested in his only son, the defendant:—

Held, that the above grants were ineffectual and void in law, as having been made by the lord to himself; and that there was nothing in the facts stated in the case to warrant the court in presuming, as to the grants made subsequently to the date of the indenture of August 1, 1833, that they were made by the Duke as agent for the trustees named in that deed. *The Dean and Chapter of Christchurch v. The Duke of Buckingham*, 391.

**[COPYHOLD CUSTOM.]**

In ejectment for a forfeiture, by a lord against a copyholder of inheritance, for digging and taking clay from the manor, to be sold off the manor to any one, the Defendant pleaded and proved a custom from time immemorial for the copyholders of inheritance, without license from the lord, to break the surface and dig clay without limit, from and out of their copyhold tenements, for the purpose of making it into bricks to be sold off the manor:—

Held (*dub.* Lord Wensleydale), that this custom was good in law. *Marquis of Salisbury v. Gladstone* (H. of L.), 843.]

**COPYRIGHT.**—See **DRAMATIC COPYRIGHT.**

**CORPORATION.**—See **MORTGAGE, 1.**

**COSTS.**

*Under 15 & 16 Vict. c. 54, s. 4.*

1. A plaintiff is entitled to costs under the 15 & 16 Vict. c. 54, s. 4, though he obtains a verdict for 40s. only, if his permanent place of residence is more than twenty miles from the place where the plaintiff dwells or carries on his business, although at the time of the commencement of the action he was for a temporary purpose residing within that distance.

*Marsh v. Conquest*, 432.

*Certificate under 15 & 16 Vict. c. 83, s. 43.*

2. The 43d section of the Patent Law Amendment Act, 15 & 16 Vict. c. 83, enacts that it shall be lawful for the judge before whom an action for infringing letters-patent shall be tried, to certify on the record that the validity of the patent came in question; and that "the record, with such certificate, being given in evidence in any suit or action for infringing the said letters-patent," shall entitle the plaintiff, on obtaining final judgment, to "his full costs, charges, and expenses, taxed as between attorney and client," unless the judge shall certify that he ought not to have such full costs.

An action having been brought by a patentee (substantially) for the recovery of royalties due under a license, a compromise was entered into before the plaintiff's case was closed, and an order of nisi prius was drawn up, under which the defendant was to pay an agreed sum, and a verdict was to be entered for the plaintiff in the action, for 40s. damages, and costs, with all "usual certificates."

After the cause was thus disposed of, the presiding judge, upon an ex parte application, endorsed on the record a certificate that the record in a certain action wherein Bovill was plaintiff and Keyworth was defendant, and the certificate thereon endorsed, was given in evidence at the trial of this action:—

Held, that this certificate was improperly granted,—the record and certificate in the former action not having been given in evidence,—and it not being under the circumstances a "usual certificate" within the contemplation of the parties. *Bovill v. Hadley*, 436.

**COUNTY COURT.**

*Costs under 15 & 16 Vict. c. 54, s. 4.*—See **COSTS, 1.**

**DAMAGES.**

*Measure of.*

*Conversion of goods.*—1. In an action for the conversion of goods of which the plaintiff has the immediate right of possession, the true measure of damages is the full value of the goods at the time of the conversion. *Edmondson v. Nuttall*, 280.

2. The plaintiff had certain looms in the defendant's mill, and demanded possession of them, the defendant having no right to detain them. The defendant, however, having obtained a judgment against the plaintiff in the county court, in respect of which he would be entitled to issue execution against him on the next day, refused to deliver them up: and the looms were taken in execution on the following morning, and sold. In an action

**DAMAGES.***Measure of (continued).*

for this wrongful conversion,—Held, that the liability of the looms to the county court process, and the fact that by the wrongful seizure the plaintiff's debt was (apparently) satisfied, were not circumstances which the jury could take into consideration in estimating the damages. *Edmondson v. Nuttall*, 280.

3. The defendants being employed as agents for the plaintiffs (a foreign company) to negotiate sales of candles for them in this country, conveyed to them an order from one S. for 2500 cases, to be delivered in London "free on board export ship: 2½ per cent. discount against bill at three days' sight: goods, invoice, and draft for acceptance to be sent to us." The plaintiffs did not in terms accept this proposal, but wrote to the defendants on the 19th of June, as follows,—"*Les informations sur S. sont telles que nous ne pouvons lui livrer les 2500 caisses que contre connaissance. Si vous voulez, nous vous enverrons les connaissances, et vous ne les lui livrerrez que contre paiement.*" The defendants informed S. that the plaintiffs accepted the order on condition that he handed them (the defendants) a check in exchange for the bill of lading; and to this S. assented, provided he was allowed a discount of 3 per cent. instead of 2½, to which the plaintiffs agreed. On the arrival of the goods in London, the defendants caused them to be transhipped on board a vessel called the *Laurel* (named by S.) bound for Melbourne, taking the mate's receipt in their own name. They afterwards tendered that document to S. and demanded payment, which he promised to make on the following Saturday. S., however, failed to pay according to his promise, and the *Laurel* sailed to Melbourne with the goods on board.

Under the instruction of the judge, the jury found that the meaning of the plaintiffs' letter of the 19th of June was, that the defendants were not to part with the goods out of their possession or control, until they had received the price thereof from S. :—

Held, that the conduct of the defendants amounted to a breach of their contract with the plaintiffs; and that the proper amount of damages was the value of the goods. *The Stearine Kaarsen Fabrick Gonda Company v. Heintsmann*, 56.

4. *Costs of defence.* Gunpowder was shipped for Valparaiso on board a vessel chartered on a voyage to that port, with liberty to touch and stay at the Falkland Islands. On the arrival of the vessel at Port Stanley, where the captain had goods to unload for the defendants, it was found that by the regulations of the port it would be necessary to land and store the powder before the vessel could enter the harbour. To avoid the inconvenience and expense of this, the captain accepted the offer of the agent of the defendants of the use of a vessel belonging to them, called the *Fairy*, in which to place the powder during his stay at Port Stanley. The defendants' agent afterwards requiring the *Fairy* for another purpose, without the consent of the captain transhipped the powder to a half-decked vessel called the *Lily*, which the jury found to be an unsafe and improper vessel for the purpose. Whilst the *Lily* was anchored outside the harbour, a storm arose and she was sunk, and the powder lost :—Held, that the defendants were responsible for the value, for that they were either trespassers in removing the powder without the captain's consent, or bailees who had been guilty of want of reasonable care. *Ronneberg v. The Falkland Islands Company*, 1.

5. On the arrival of the ship at Valparaiso, the consignees of the powder demanded it from the captain, and, not obtaining it, took proceedings against the ship, which the captain unsuccessfully resisted, being ultimately compelled to pay the consignees the value of the powder and the costs :—Held, that the owners of the ship could not claim these costs from the defendants, they not being a necessary consequence of their wrongful act. *Ib.*

**DEAD FREIGHT.**—See **SHIPPING**, 4.

**DIVORCE.**—See **HUSBAND AND WIFE**.

**DOG.***Chasing Game.*

An action lies against the owner of a dog, who, knowing the animal to have a propensity for chasing and destroying game, permits it to be at large, and the dog in consequence "breaks and enters" the plaintiff's wood, and chases and destroys young pheasants which are being reared there under domestic hens. *Read v. Edwards*, 245.

**DOMESTIC SERVANT.**—See **MASTER AND SERVANT**.

**DRAMATIC COPYRIGHT.***Assignment of.*

1. It is competent to the assignee of "the sole right of representing" a dramatic piece to sue for penalties under the 3 & 4 W. 4, c. 15, s. 2, notwithstanding the assignment is

**DRAMATIC COPYRIGHT.***Assignment of (continued).*

not by deed or registered under the Copyright Act, 5 & 6 Viet. c. 45. *Marsh v. Conquest*, 418.

2. The defendant, the proprietor of a theatre, let it for one night for the benefit of one of his performers, who was to pay him 30*l.* for the use of it for that night, together with the services of the corps dramatique, band, lights, and accessories. The performer who so had the use of the theatre represented therein a dramatic piece the sole right of representing which had been assigned to the plaintiff:—Held, that the defendant “caused the piece to be represented,” and consequently was guilty of an infringement of the plaintiff’s right, and liable to the penalty imposed by the Dramatic Copyright Act, 3 & 4 W. 4, c. 15, s. 2. *Ib.*

3. The assignment of the copyright of a book consisting of or containing a dramatic piece does not, in the absence of an expressed intention that it should do so, pass the right of representing or performing it. That may be the subject of a subsequent assignment to a third person. *Ib.*

**ENCLOSURE ACT.***Construction of.*

By an act for enclosing lands in the town of Nottingham (8 & 9 Viet. c. vii.), the commissioners were to set out allotments for recreation of the inhabitants, for a cemetery, to the lords of the manor for right of soil,—to the vicar, and Earl Manvers and certain charitable trustees, and other the persons entitled to corn-tithes, vicarial tithes, &c., and to the said vicar in respect of the glebe-lands and rights of common belonging to such vicar, and to certain persons entitled to common rights; and by s. 66, after having made the before-mentioned allotments, they were to divide and allot the remainder of the lands to be enclosed unto and amongst the several owners and proprietors thereof and persons who should be entitled to any estate, right, or interest therein, in proportion to the value of their respective rights and interests. Section 69 enacted that the several allotments to be made in pursuance of the act (except the allotments to the mayor, &c., for places of recreation, &c., and the allotments to the said vicar and other persons in lieu of tithes), should be enclosed by the allottees: and by s. 70, it was provided that allotments in lieu of tithes were to be fenced at the general expense.

By s. 86, the commissioners were (before setting out any allotments to the persons entitled to rights of common, to the lord of the manor, persons entitled to tithes, and to the owners and proprietors of lands to be enclosed) to allot what they should judge sufficient to defray the expenses of and incident to the enclosure, and sell the same to defray such expenses. And by s. 89, in case the lands so set apart should be found insufficient to defray such expenses, the deficiency was to be made up and raised from time to time by a rate to be made and levied upon the several persons interested in the lands to be enclosed, except the said vicar and persons entitled to tithes, and the mayor, &c., in respect of allotments for recreation, &c.:—

Held, that the vicar was not liable to be rated in respect of the lands allotted to him on account and in lieu of the lands claimed by him as glebe-lands, towards the general expenses of the Enclosure Act. *Eddison v. Brookes*, 606.

**ENEMIES**.—See **INSURANCE**, 5-12. **SHIPPING**, 1, 2.

**ENTRY**.—See **TRESPASS**.

**ESTOPPEL**.—See **INSURANCE**, 11, 12.

**EVIDENCE.***Of Collateral Oral Agreement.*

1. Upon a negotiation between the plaintiff and the defendant for the sale of the fixtures, furniture, and goodwill of a business (the agreement for which was afterwards reduced into writing), a distinct and separate promise was made by the defendant, in consideration of the plaintiff’s signing the agreement, that he, the defendant, would settle an action then pending against the plaintiff at the suit of one C.:—Held, that evidence of this prior oral agreement was admissible, notwithstanding the written agreement contained an authorization to the defendant to settle C.’s action out of the purchase-money. *Lindley v. Lacey*, 578.

2. H. & Sons being engaged, under a contract in writing, in the erection of certain engineer’s work for N., for which iron and brass castings were required, and Hill, the founder from whom the castings were procured, having a claim against H. & Sons to the amount of 218*l.* for goods already supplied, and refusing to continue the supply without obtaining payment or security for that sum, N. consented to give Hill a guarantee in the



## EVIDENCE.

*Of Collateral Oral Agreement (continued).*

following terms,—“May 22, 1861. Mr. J. N. agrees to pay Mrs. Hill, iron-founder, on H. & Son's account, the sum of 218*l.*, being the amount owing to her by them, together with interest, in six months from the above date, *providing he has work done as security for the same.*”

In an action by the representatives of Hill against N. upon this guarantee:—Held, that it was a condition of N.'s liability thereon, that, at the end of the six months, work should have been done by H. & Sons for him in respect of which a debt should be due from him to them; and that the plaintiffs could not recover without producing the contract between H. & Sons and N. under which the work was done. *Hill v. Nuttall*, 262.

*Parol Evidence of a Contract partly in Writing.*—See CONTRACT, 2, 3.

*Examinations taken before a Receiver of Wrecks under the 17 & 18 Vict. c. 104, s. 448.*—See SHIPPING, 7.

And see WITNESS.

FEROCIOUS DOG,—See Dog.

FOREIGN DOCUMENT,—See WITNESS.

FOREIGN JUDGMENT.

*How far conclusive.*—See INSURANCE, 7-12.

FRAUDULENT CONCEALMENT,—See PRINCIPAL AND SURETY.

FREIGHT,—See SHIPPING, 2, 3, 4.

GAME.

*Negligent Destruction of.*

An action lies against the owner of a dog, who, knowing the animal to have a propensity for chasing and destroying game, permits it to be at large, and the dog in consequence “breaks and enters” the plaintiff's wood, and chases and destroys young pheasants which are being reared there under domestic hens. *Read v. Edwards*, 245.

GRANT.

*Reservation out of.*

A railway company, being possessed of a ship-yard in which was a “slip” for docking vessels, by indenture demised the yard to B., subject to the following reservation:—“Except and always reserved out of this demise the patent slip (as shown on a plan), and the machinery and apparatus connected therewith, and the site thereof, and the dues and payments payable for the use thereof, and except and always reserved unto the said company, their successors and assigns, officers, servants, and workmen, free access at all times to and from the said slip, for the purpose of working and using or repairing the same, or otherwise:”—

Held, that it was competent to the company to grant “licenses” to persons to use the slip, on payment to them of certain dues; and that the right of access to and of using the slip was not limited to persons claiming to exercise it in the character of “assigns” of the company, in the strict sense. *Mitcalfe v. Westaway*, 658.

GUARANTEE.

*Tainted with Fraud.*

A., being about to compound with his creditors, in order to induce B. (one of them) to execute the deed, without the knowledge of the other creditors gave him two promissory notes for 25*l.* each beyond the amount of the composition. Upon the first of these becoming due it was dishonoured, and an action was brought upon it, and judgment obtained, and execution issued. C., who was a party to the notes, in consideration of A.'s forbearing to enforce the judgment, gave him a guarantee for the amount of the judgment and the outstanding note; and thereupon the two notes were given up:—Held, that the guarantee was tainted with the original fraud, and therefore could not be enforced, notwithstanding part of the consideration for it was the giving up a judgment in an action in which the illegality might have been but was not pleaded. *Clay v. Ray*, 188.

HORSE RACING,—See BETTING-HOUSES.

HUNTSMAN,—See DOMESTIC SERVANT.

HUSBAND AND WIFE.

*Liability of Husband Divorced.*

One who has obtained a sentence of dissolution of marriage in the Divorce Court, is not liable to be joined in an action for a tort committed by his wife during the coverture. *Capel v. Powell*, 743.

ILLEGALITY OF CONSIDERATION,—See GUARANTEE.

IMMEMORIAL CUSTOM,—See COLNE FISHERY ACT.

IMPLIED WARRANTY,—See WARRANTY.

INFANT.

*Necessaries*,—See MARRIAGE SETTLEMENT.

INHABITANT,—See RAYE.

INN,—See ALMOUSE.

INSOLVENT DEBTOR.

*Discharge of*, under 1 & 2 Vict. c. 110.

The discharge of an insolvent debtor under the 1 & 2 Vict. c. 110, s. 75, is no release of a debt created by the payment by a surety, after the discharge, of a bill the consideration for which was inserted in the schedule as a debt for money lent due to the payee. *Litten v. Dalton*, 178.

INSPECTION OF DOCUMENTS,—See PRACTICE, 2.

INSURANCE.

*Insurable Interest.*

1. A., who had been in the habit of buying largely of guano from B. & Co., of Liverpool, at prices which were settled at the beginning of each year, wrote to them on the 14th of February ordering a shipment of 100 tons, provided freight did not exceed 6s. 6d. On the 26th B. & Co. wrote in answer,—“We have succeeded in fixing the schooner Anne and Isabella to carry about 115 tons at your limit of 6s. 6d. per ton. We presume we may value upon you at six months from the date of shipment at 10l. per ton,” &c.; adding in a postscript,—“Please say if you purpose effecting insurance at your end.” On the 3d of March, A. wrote,—“I am favoured with yours of 26th. You say we presume we charge you 10l. per ton net cash, &c. I really cannot understand this, when I know that Mr. L. supplies your guano in Scotland at 9l. 15s. net there to dealers. Besides, I look, as heretofore, for the special allowance made to me at the origin of our transactions; and, now that you are making some changes, it may be as well that I should know how we are to get on for the future.” And he concluded with a request that some flowering shrubs should be sent to him “in charge of the captain.” On the same day, A. effected an insurance on the guano per Anne and Isabella.

The guano was shipped at Liverpool on the 4th of March, under a bill of lading making it deliverable to B. & Co. or their assigns. The bill of lading (unendorsed) was sent from Liverpool to one of the members of the firm of B. & Co. (then at Belfast) who was about to pay A. a friendly visit at Londonderry. That gentleman arrived at A.’s house on the evening of Saturday the 7th of March, when he told A. that he had received the bill of lading and invoice of the guano and a draft for A.’s acceptance for the amount; and on the morning of the 9th they went together to A.’s office, and there the bill of lading was endorsed and handed over with the invoice to A., who thereupon accepted the bill. In the course of the same day they heard for the first time that the Anne and Isabella with the guano on board had been wrecked on the coast near Londonderry:—

Held, that the property in the guano passed to A. by the contract from the time of its shipment,—A.’s letter of the 3d of March not being a repudiation, though expressing some dissatisfaction at the price: and that A. had an insurable interest in the cargo at the time of the loss. *Joyce v. Swann*, 84.

2. *Seem*, per Willes, J., that A. would have had an insurable interest, even though the property in the guano had not absolutely passed to him by the contract. *Id.*

*Valued Policy on Cargo.*

3. By a time policy the ship valued at 2000l. and goods valued at 8000l. were insured on a barter voyage to the coast of Africa; and it was stipulated that “outward cargo should be considered homeward interest twenty-four hours after arrival at first port or place of trade,”—“with liberty to extend the valuation of the homeward cargo.”

The vessel with the outward cargo on board arrived at Kinsembo, the first place of trade on the coast of Africa, and there landed a portion of her cargo, and, after remaining at Kinsembo more than twenty-four hours, she sailed thence with the remainder, without having received any other goods there, and was totally lost:—

Held,—affirming the judgment of the Court of Common Pleas,—that the assured were only entitled to recover upon this policy the value of that portion of the cargo which was actually on board at the time of the loss. *Tobin v. Harford*, 528.

*Seaworthiness of Goods.*

4. It is not a condition precedent to the attaching of a policy on goods against sea-

## INSURANCE.

*Seaworthiness of Goods (continued).*

risks, that the subject of insurance should at the commencement of the voyage be fit to encounter the ordinary vicissitudes of a voyage. *Koebel v. Saunders*, 71.

*Loss by Seizure.*

5. Goods that are contraband of war, in the course of transport from a neutral port to a neutral port, in a neutral ship, are not by the law of nations liable to seizure by the cruisers of a belligerent state, even though the shipper may know or intend that they shall ultimately reach a port belonging to the enemies of the captors. To render goods contraband of war liable to seizure, they must be taken in delicto, that is, in the actual prosecution of a voyage to an enemy's port. *Hobbs v. Henning*, 791.

6. Nor does the mere fact that the ship carries simulated papers per se operate a forfeiture of either ship or goods, though it may afford evidence from which a prize court may infer that the ship or goods were enemies' property, or that her destination was to a blockaded port or to an enemy's port with contraband of war. *Ib.*

7. The sentence of a foreign Court of Admiralty condemning a ship or goods as lawful prize, is not conclusive in the courts of this country as to the ground of condemnation, unless stated upon the face of it without ambiguity. It is competent to our courts to examine the sentence carefully to see whether it proceeds on that which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. *Ib.*

8. To an action upon a valued policy on goods on board the *Peterhoff* at and from London to Matamoras (a port in Mexico notorious for being the place to which goods contraband of war intended for the use of the confederate states of North America were sent, for the purpose of being forwarded to Wilmington or Charleston), against capture amongst other things, and averring a loss by a peril insured against,—the defendant pleaded (seventhly) that the goods were contraband of war, and were shipped by the insured for the purpose of being sent to and imported into a port in North America situate in a state engaged in hostilities with the United States of America, and were liable to be seized by the cruisers of the United States as contraband of war, and that the ship was during the continuance of the risk and at the time of the loss carrying goods and papers which rendered her liable to be seized by such cruisers, and that the ship and goods were seized accordingly,—of all which the defendant at the time of subscribing the policy was wholly ignorant.

The plaintiff replied to the seventh plea, that the voyage in the declaration and in the policy of insurance mentioned was a voyage to a certain port in Mexico, to wit, to Matamoras, and not a voyage to any port in North America situate in a state engaged in hostilities with the United States of America, and that the said ship and goods while proceeding on the said voyage to Matamoras were seized as in the declaration alleged.

The plaintiff also demurred to the seventh plea, on the ground that it disclosed no defence to the action:—

Held, that it was consistent with the plea that the goods were sent from a neutral port to a neutral port in a neutral ship, and therefore not liable to seizure; that the allegation that they were shipped for the purpose of being sent to an enemy's port, did not deny the destination to the neutral port to which the insurance related, but merely introduced a purpose existing in the mind of the assured for the ulterior disposition of the cargo and ship after the termination of the voyage insured, and consequently that the plea was no answer to the action; that the allegation that the ship was carrying papers which rendered her liable to be seized, was not an accurate statement in reference to the law of nations, the having simulated papers alone not being a breach of neutrality so as to work a forfeiture of the ship; and that the allegation that the defendant at the time of effecting the insurance was ignorant of the premises was under the circumstances an immaterial allegation. *Ib.*

9. The eighth plea stated, that, before action brought, the ship and goods were during hostilities between the United States of America and the confederate states seized by the cruisers of the United States of America, and carried to a port in the said United States, and such proceedings were duly and according to the law of nations had that it was duly adjudged and determined by an United States prize court held at New York, and having competent jurisdiction, that the said ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea, and that the said ship with her said cargo was not truly destined to the port of Matamoras, but, on the contrary, was destined to some other port or place, and in aid and for the use of persons then at war with the said United States, and in violation of the law of nations, and that the ship's papers were simulated and false as to her real destination, and thereupon it was considered and adjudged by the said court, then having

**INSURANCE.***Loss by Seizure (continued).*

competent jurisdiction in that behalf, that the said ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited accordingly:—

Held, that the conclusion to be arrived at from an examination of the judgment set out in the plea, was, that the court did not intend to find, as a matter of fact, either that the ship had not sailed on a voyage to Matamoras, or that, after having so sailed, she had deviated from that voyage; but that, on the contrary, they condemned her as lawful prize because she was in the prosecution of that voyage with an ulterior destination either for the cargo or the ship, or both, as before explained; and that therefore the judgment did not sustain the inferences of fact which the defendant sought to establish thereby, or sustain his claim of right to prevent the plaintiff from showing the truth in respect of this fact; and therefore that the plea was bad. *Hibbs v. Henning*, 791.

10. Held also, that the eighth plea was open to the further objection that it did not plead the issuable fact in respect of the voyage, but the evidence which might prove that fact. *Ib.*

11. And held by Erie, C. J., and Byles, J. (Keating, J., not dissenting), that the eighth plea and the rejoinders hereafter mentioned were bad, because the finding of a matter of fact in the course of the adjudication of a prize-court, cannot be pleaded as an estoppel in the cases where, if adduced in evidence, the judgment would be received as conclusive evidence of the fact so found. *Ib.*

12. The rejoinder to the replication to the third plea stated that the plaintiff ought not to be admitted to take issue on the third plea, and deny the truth thereof, because before action brought the ship and goods were during hostilities between the United States of America and the confederate states seized and carried into port as in the eighth plea mentioned, and such proceedings were thereupon had and such adjudication made as in that plea mentioned; and that, before action brought, all things had happened and all times had elapsed necessary to make the said adjudication binding on the plaintiff, and to entitle the defendant to rejoin the same as an estoppel to the plaintiff's said replication. The rejoinder to the second replication to the seventh plea set out the sentence of the New York prize court, as in the eighth plea. To each of these rejoinders the plaintiff demurred, on the ground that it could not be pleaded as an estoppel in answer to the replication:—

Held, that the rejoinders were bad for the same reasons as those for which the eighth plea was held bad. *Ib.*

*Against Accidents, &c.*

13. By one of the conditions of a policy of insurance against accidental death or injury, it was provided that the policy insured against cuts, stabs, concussions, &c., &c., "when accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his avocations;" and then followed this exception,—“but it does not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or cause arising within the system of the insured, before, or at the time, or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury.”—Held, that death from hernia caused solely and directly by external violence, followed by a surgical operation performed for the purpose of relieving the patient, is not within the above exception. *Fitton v. The Accidental Death Insurance Company*, 122.

**INTERPRETER,—See WITNESS.****JOINT-STOCK COMPANY,—See MORTGAGE, 1.***Liability of Directors.*

The defendant and others, as provisional directors of a projected joint-stock company, resolved at a meeting that the company should be advertised in several newspapers, and directed their secretary to take the necessary steps for that purpose. The secretary accordingly applied to an advertising agent, to whom (on his calling at the company's offices to inquire under what authority the secretary was acting) he showed the prospectus and the above resolutions:—

Held,—affirming the judgment of the Common Pleas,—that there was evidence to go to the jury that the directors who were parties to the resolutions were responsible for the debt thereby incurred, notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all the preliminary expenses would be provided for by him, and that they would incur no liability,—there being nothing to show that the secretary, in giving the orders, or in communicating to the plaintiffs the resolutions of the directors, had acted beyond the scope of his actual or apparent authority as secretary. *Maddick v. Marshall*, 829.

## LANDLORD AND TENANT.

*Notice to determine tenancy.*

1. By an agreement for a lease of mines and ironworks between A. and B., the former agreed to grant and the latter to accept a lease of the ironworks and premises for twenty-one years from the 19th of August, 1861, subject to the stipulations thereafter contained; such lease to contain, in addition to anything specially provided for in the agreement, proper covenants for the effectual working of the minerals, for the repair, &c., of the works, for keeping proper accounts, and for permitting A. or his agents to inspect such works and accounts, and all other usual and customary clauses; and it was further agreed that B. should pay to A. during the continuance of the agreement or the lease to be granted thereunder certain royalties on coals and minerals obtained,—that if, in the first and second years, the royalties should not amount to 500*l.* each year (or in the third and any subsequent year 1500*l.*), then B. should advance and pay to A. for each of those years such sum as with the royalties for that year would make up the full sum of 500*l.* or 1500*l.*,—that, if any sum of money should be so advanced to make up “the said respective minimum rents” in any one year, the amount of such advance might be deducted out of the excess of royalties above such minimum rent accruing during any succeeding year,—that B. should pay to A., by way of rent for the plant, &c., the yearly sum of 7000*l.* during the continuance of the demise, B. to have the right, in any year in which the profits arising from the works should not amount to 21,000*l.*, to pay so much only of the said rent as should be equal to one-third of the profits of such year,—that B. should forthwith commence operations, and within three months expend such sum as might be required for the erection of machinery, &c., and would, so long as the agreement or lease should subsist, use all diligence to work the minerals effectually and profitably; and that, in consideration of such expenditure, no royalties or sum in lieu thereof should be payable in respect of such three months’ workings,—that, in case, within the second three months from the date of the agreement, the royalties did not amount to 125*l.*, and B. did not pay that sum in anticipation of future royalties, A. should be at liberty, at the end of one month from the expiration of such second three months, by notice in writing to annul and determine the agreement; or if, within any six months after the expiration of such second three months, B. did not pay A. in royalties or in money the sums thereby respectively made payable, or if B. should cease to carry on the works with due diligence and effect for three months, A. should be at liberty, at the end of one month from the expiration of any such six months, or of any such three months’ cessation or want of diligence in working, by three months’ notice in writing, to annul and determine the agreement or the lease thereby agreed to be granted,—and that B. was to be at liberty, at any time thereafter, to determine the agreement, or the lease thereby agreed to be granted, and to abandon the works, on giving A. six months’ notice in writing of his intention so to do.

B. entered under this agreement; and no lease was ever granted. The 125*l.* dead rent was paid for the second quarter, ending on the 19th of February, 1862; and a further sum of 250*l.* was paid for the half year ending on the 19th of August, 1862. No further payment was made in respect of rent or royalties until the 21st of November, 1863, when B. paid 500*l.* for the rent accruing for the year ending on the 19th of August.

On the 10th of August, 1863, B. gave A. a six months’ notice to determine the agreement on the 13th of February, 1864:—

Held,—dubitante Williams, J.,—that, regard being had to the various provisions of the agreement and the nature of the property demised, it was competent to B. to put an end to the agreement by a six months’ notice, to expire at any time,—without regard to the ordinary rule for determining a tenancy from year to year at the expiration of a current year; and that A. was only entitled to recover the proportion of the dead rent accruing between the 19th of August, 1863, and the 13th of February, 1864. *Bridges v. Potts*, 314.

*Quare*, per Williams, J., whether the Apportionment Act of 4 & 5 W. 4, c. 22, s. 2, is applicable to such a case? *Ib.*

*Semble*, per Byles, J., that it is. *Ib.*

LEASE,—See TRESPASS.

## LETTERS-PATENT.

*Registration of title.*

1. It is no ground of objection to the title of an assignee of a patent, that the assignors, the executors of the grantee, had omitted to register the probate until after the date of the assignment; though possibly it might be an obstacle to the maintenance of an action by the assignee for an infringement, if commenced before the registration of the probate. *Elwood v. Christy*, 754.

*License to manufacture.*

2. A license to A. to manufacture a patent article is an authority to his vendees to vend it without the consent of the patentee. *Thomas v. Hunt*, 183.

**LETTERS-PATENT** (*continued*).

*Certificates for Costs*,—See **COSTS**, 2.

**LIBEL.**

*What amounts to.*

The plaintiff declared upon a letter written by the defendant, in which it was alleged that the former had for years, without cause, systematically done everything to annoy the latter, and had unnecessarily dragged him into the Court of Chancery and put him to great expense:—Held, on demurrer, that the court could not so clearly see that the letter could not be libellous, as to justify them in withdrawing the case from a jury. *Fray v. Fray*, 603.

**LICENSE**,—See **GRANT**.

**LICENSE TO DREDGE**,—See **COLNE FISHERY ACT**.

**MARRIAGE SETTLEMENT.**

*Costs of, by whom paid.*

1. In the case of a settlement of personal property, the practice is for the lady's solicitor to draw the settlement, and for the husband to pay for it. *Heips v. Olayton*, 553.

2. Where the lady was an infant residing with and forming part of the family of her father, and the instructions for the settlement were given by the father, under circumstances from which the court (exercising the functions of a jury) inferred that such instructions were given by her father as her agent,—Held, that she, sued jointly with her husband, was liable for the expenses as for a debt contracted by her for *necessaries* before the marriage. *Ib*.

**MASTER AND SERVANT**

*Determination of Hiring.*

A *huntsman* is a menial servant, and therefore the hiring of a huntsman, though in terms for a year, and upon conditions which can only be fully carried out by a service ensuring for the full period of a year, is subject to the ordinary condition that it may be determined by either party at a month's notice. *Nicoll v. Greaves*, 27.

**MEASURE OF DAMAGES**,—See **DAMAGES**.

**MEMORANDA.**

*Judges.*

Illness of Williams, J., 538.

Death of the Hon. T. Erskine, formerly a judge of C. P., 538.

*Queen's Counsel.*

John Bridge Aspinall, 538.

**MENIAL SERVANT**,—See **MASTER AND SERVANT**.

**MERCHANT SHIPPING ACT**,—See **SHIPPING**, 7.

**MICHAEL ANGELO TAYLOR'S ACT**,—See **NUISANCE**.

**MORTGAGE.**

*Of Chattels.*

1. A., in consideration of an advance of £507. made to him by B. and C., who carried on business under the name of "The City Investment and Advance Company," by deed in the form of a mortgage assigned to them all the goods, chattels, and effects upon his farm and premises, to secure the repayment of the advance, with power to the mortgagees, on default, to sell at their discretion and to pay over the surplus to A. B. and C. took possession under this deed (which was not registered under the Bills of Sale Act), and sold the goods by auction.

D. after B. and C. had taken possession entered under a subsequent bill of sale (duly registered), and paid out a claim of the landlord for rent:—

Held, that B. and C. having perfected their title by taking possession under their mortgage, had a right to sell; and that they were not responsible to D. for any default in the mode of conducting the sale. *Maugham v. Sharpe*, 443.

2. Held also, that D. could not recover against B. and C. the sum paid by him to the landlord, as money paid to their use. *Ib*.

3. Held also, that the conveyance of the goods to "The City Investment and Advance Company," enured as a conveyance to B. and C., so soon as it was ascertained that they were the persons who carried on business under that name. *Ib*.

**NEGLIGENCE**,—See **ATTORNEY**, 2, 3.

**NEUTRALS**,—See **INSURANCE**, 6-12.

**NOTTINGHAM ENCLOSURE ACT**,—See **ENCLOSURE ACT**.

## NUISANCE.

### *Removal of.*

The powers conferred upon the commissioners under the 68th section of Michael Angelo Taylor's Act, 57 G. 3, c. xxix., absolutely to prevent the keeping of swine in or within forty yards of any dwelling, &c., within the district comprised in that act, is not extended by the 73d section of the Metropolis Local Management Acts Amendment Act, 25 & 26 Vict. c. 102, to the larger district comprised within such last-mentioned act. *Chelsea Vestry*, app., King, resp., 626.

ORAL AGREEMENT,—See EVIDENCE.

PHEASANTS,—See GAME.

PIGS,—See NUISANCE.

## PRACTICE.

### *Writ for Service upon a British Subject Abroad.*

1. A claim for a balance due as the result of cross-consignments and remittances between a merchant here and a merchant (a British subject) domiciled and carrying on business exclusively at the Cape of Good Hope, is "a cause of action which arose within the jurisdiction" of the superior courts at Westminster, or "in respect of the breach of a contract made within the jurisdiction," within the 18th section of the Common Law Procedure Act, 1852. *Horwood v. Wood*, 749.

### *Inspection of Documents.*

2. Inspection under the 50th section of the Common Law Procedure Act, 1854, will only be allowed where it is reasonably shown that the documents sought to be inspected really exist, and are relevant to the case of the party seeking the inspection. *Houghton v. The London and County Assurance Company*, 80.

### *Substituting a Defendant on the Record.*

3. The judge having at the trial substituted for the defendant on the record the name of the person really intended to be sued, and directed a verdict to be entered for the plaintiff against that person "sued as, &c.," the court refused to order the verdict to be entered for the defendant named originally on the record, for the purpose of enabling him to get costs,—there being suspicion of collusion. *Podmore v. Schmidt*, 725.

### *Changing the Venue.*—See VENUE.

## PRINCIPAL AND AGENT.

### *How far Principal affected by Knowledge of the Agent.*

1. A. placed timber in the hands of H., a factor, for sale on a *del credere* commission. B. bought it through the agency of C., a broker, who (as H. was aware) had prior knowledge of the fact that the timber was the property of A., and that H. was selling as factor only. C.'s knowledge of the relative position of A. and H., however, was not communicated to B., who made the purchase *bonâ fide*, although he was aware that H. was in the habit of selling timber as factor:—

Held,—reversing the decision of the Court of Common Pleas,—in an action by A. against B. for the price of the timber, that B. was affected by the knowledge of his broker C., and therefore could not set off against the price of the timber so bought for him a debt due to him from H. *Dresser v. Norwood*, 466.

2. *Quære*, whether H.'s ignorance of the state of knowledge of C. would make any difference? *Ib.*

## PRINCIPAL AND SURETY.

### *Concealment of Material Information.*

One P. had been employed by the plaintiffs in the sale of coals for them on commission, for which he at the end of each month gave them his acceptances, and by the terms of his agreement he was to hand over to them within six days all moneys he received from customers. P. having fallen in arrear to the extent of 1272*l.*, the plaintiffs required him to find security to the amount of 300*l.*, and at his request the defendant consented to guarantee 100*l.* The agreement of guarantee recited the terms of dealing between the plaintiffs and P.; but the fact that P. was already indebted to the plaintiffs in the large sum above mentioned was concealed from the sureties.

In an action against the defendant upon the agreement, he pleaded that he was induced to make it by the fraudulent concealment by the plaintiffs of a material fact:—Held, by Crompton, J., Channell, B., Blackburn, J., and Shree, J., in the Exchequer Chamber,—affirming the judgment of the court below,—that the non-communication by the plaintiffs to the defendant of the fact that P. was at the time indebted to them, was evidence for the jury in support of the plea,—Pollock, C. B., and Bramwell, B., dissenting. *Lee v. Jones*, 482.

**PRIZE COURT.**

*Judgment of, how far conclusive,—See INSURANCE, 6-12.*

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**RAILWAY COMPANY.**

*Taking of Lands under Compulsory Powers.*

The plaintiff, who had a leasehold interest in premises held by a tenant from year to year, received notice from a projected railway company that the premises were required for the purposes of their undertaking; and the company subsequently arranged with the tenant and received from him the key. The plaintiff thereupon gave the company notice, under the 68th section of the Lands Clauses Consolidation Act, 1845, of the amount of her claim and the nature of her interest in the premises, and requiring them to issue their warrant to the sheriff to summon a jury; and, upon their neglecting so to do, she brought an action for the sum claimed:—

Held, that these facts warranted the jury in finding that the company had *actually taken* the premises, and consequently that they were liable for the amount demanded. *Barker v. The Metropolitan Railway Company, 785.*

**RATE.**

*Under a Local Act.*

By a local act (of 1719) creating the township of Sunderland a distinct parish, twenty-four "substantial and creditable inhabitants" of the parish were to be elected vestrymen; and it was enacted that the rector and thirteen or more of the vestrymen in vestry assembled, or the major part of them, might make a rate for, amongst other things, keeping the church in repair,—with a power to four or more justices, in case of default in payment of the rate, to grant and issue their warrant to levy the same by distress and sale of the offender's goods: and a power of appeal to the sessions was given to any person who should find himself aggrieved by any assessment, or by any distress to be made for the same, within three months after such distress made:—

Held, that the justices had no jurisdiction to inquire into the validity of the rate, the remedy, if it were invalid, being by appeal to the sessions; and that, if they had jurisdiction, the fact of some of the vestrymen not *residing* and *sleeping* within the parish did not disqualify them. *Wilson, app., The Churchwardens of Sunderland, resp., 694.*

**READINESS TO DELIVER,—See SHIPPING, 5, 6.**

**RECEIVER OF WRECKS,—See SHIPPING, 7.**

**REFRESHMENT FOR TRAVELLERS,—See ALERHOUSE.**

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*When Property passes.*

1. There may be a complete contract so as to pass the property in goods from the seller to the buyer, although the price has not been definitively agreed on between them. *Joyce v. Swann, 84.*

2. Where from all the facts it may be fairly inferred that it was the intention of the seller to pass the property in goods shipped to order, the mere circumstance of the bill of lading being taken in the name of the seller, and remaining unendorsed, will not prevent its passing. *Id.*

3. A., who had been in the habit of buying largely of guano from B. & Co., of Liverpool, at prices which were settled at the beginning of each year, wrote to them on the 14th of February ordering a shipment of 100 tons, provided freight did not exceed 6s. 6d. On the 26th B. & Co. wrote in answer:—"We have succeeded in fixing the schooner Anne and Isabella to carry about 115 tons at your limit of 6s. 6d. per ton. We presume we may value upon you at six months from the date of shipment at 10l. per ton," &c.: adding in a postscript,—"Please say if you purpose effecting an insurance at your end." On the 3d of March, A. wrote,—"I am favoured with yours of 26th. You say we presume we charge you 10l. per ton net cash, &c. I really cannot understand this, when I know that Mr. L. supplies your guano in Scotland at 9l. 15s. net there to dealers. Besides, I look, as heretofore, for the special allowance made to me at the origin of our transactions: and, now that you are making some changes, it may be as well that I should know how we are



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**VENDOR AND PURCHASER.**

*Rescission of Contract (continued).*

other compensation, notwithstanding any attempt made to remove or comply with such objection or requisition."

An abstract was delivered to the purchasers' solicitor on the 6th of September. On the 23d of September objections and requisitions were delivered to the vendors' solicitor. On the 4th of November (which was six days after the time mentioned in the contract for the completion thereof), the vendors' solicitor forwarded to the purchasers' solicitor replies to the requisition on title. Nothing further was done until the 29th of November, when the plaintiffs issued a writ against the vendors' solicitor to recover back the 285*l.* deposited with him. The deposit was thereupon returned: and on the 11th of December the vendors gave notice to rescind the contract.

In an action brought by the purchasers on the 16th of December, to recover interest on the deposit, and their costs of investigating the title:—Held, that the vendors were not bound to exercise their option to rescind immediately on receiving the objections and requisitions, or before the day named for the completion of the contract; but that,—time not being the essence of the contract,—they might do so within a reasonable time, and that, under the circumstances (which the court were to deal with as a jury ought), their notice was given within a reasonable time. *St. Leonards, Shoreditch (Vestry) v. Hughes*, 137.

**VENUE.**

*Changing.*

1. It is no ground for changing the venue in an action for a libel contained in a local newspaper, that the defendant, the proprietor, possesses much influence in the county in which the venue is laid, and has since the commencement of the action evinced a disposition to exercise it to the plaintiff's prejudice. *Walker v. Brogden*, 571.

2. But the court intimated that they would interfere if the defendant should before the trial publish anything in relation to the matter of the action reflecting upon the plaintiff. *Ib.*

**VESTRYMEN.**

*Qualification of.* See **RATE.**

**WARRANTY.**

*On Sale of Goods.*

*Of Title.*] 1. In the case of goods sold in an open shop or warehouse, there is an implied warranty on the part of the seller that he is the owner of the goods: and, if it turns out otherwise,—as, where the goods are claimed by the true owner, from whom they have been stolen,—the buyer may recover back the price as money paid upon a consideration which has failed. *Eichholz v. Bannister*, 708.

*Of Quality.*] 2. A., after inspection of the separate parts, bought of B. soap-frames which were by the contract warranted to be "new frames, with all nuts and bolts complete and perfect." In an action for a breach of this warranty, the declaration alleged that the plaintiff warranted the frames to be fit for the purpose of making soap: and at the trial it was proved, and found by the jury, that, though new, and having the proper number of nuts and bolts, the frames were not reasonably fit for the purpose of making soap:—Held, that the evidence sustained the declaration. *Mallas v. Rudloff*, 588.

3. Upon the sale of an ascertained article, a known machine, the component parts of which have been inspected by the buyer,—*Quare*, whether there is any implied warranty that the thing is fit for the purpose for which it professes to have been constructed? *Ib.*

**WILL.**

*Presumption of Revocation of.*

Where a will and codicil (the drafts of which were produced) were proved to have been left by the attorney who drew them with the testator after execution, but were not forthcoming after his death,—declarations of the testator to various members of his family down to a few days before his death, expressive of his satisfaction at having settled his affairs, and intimating that his will was left with his attorney, were held to have been properly admitted, to rebut the presumption that the will and codicil had been destroyed by the testator *animo revocandi*. *Whiteley v. King*, 756.

**WITNESS.**

*To interpret a Document.*

It is not competent to a witness who is called to interpret a foreign document, to give an opinion as to its construction: that is for the court. *The Stearine Kaareen Fabrick Gonda Company v. Heintzmann*, 56.

**WRECKS,**

*Receiver of,—See SHIPPING, 7.*

## SHIPPING.

*Construction of Charter-party (continued).*

ing no authority to alter that contract, the plaintiff was entitled to the full amount of the charter freight upon these: but that, as to the 108 hogsheads shipped by L. C. & Co., after the notice of the failure of M'C., B. & Co., the master, acting in the interest of his owner, was authorized to enter into the new contract, and consequently the plaintiff was only entitled to the stipulated rate of freight (30s. per ton) upon them. *Pearson v. Gibson*, 352.

4. And held, that the plaintiff could not claim, as "dead freight," the difference between the sum he would be entitled to, calculated on the above principle, and the sum which the vessel would have earned if a full cargo had been put on board at the freight originally stipulated for. *Ib.*

5. The 67th section of the Merchant Shipping Acts Amendment Act, 1862 (25 & 26 Vict. c. 63), enacts, that, where the owner of goods imported fails to make entry thereof, or, having made entry, to land the same or take delivery thereof within a certain time, the shipowner may make entry of and land or unship the goods at the times and in the manner and subject to certain conditions,—amongst others, "if at any time before the goods are landed or unshipped, the owner has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods, or of such wharf or warehouse as last aforesaid, twenty-four hours' notice in writing of his readiness to deliver the goods," &c. :—

Held, that, to entitle himself to notice under this condition, the owner of the goods must at the time of his offer be in a condition actually to take delivery thereof. *Beresford v. Montgomerie*, 379.

6. And held, that, where the shipowner at the time of the offer to take delivery is not able to make it, he is not excused from the duty of giving twenty-four hours' notice of his readiness to deliver, because the owner of the goods or his agent does not ask for "correct information of the time at which such goods can be delivered." *Ib.*

*Examination by Receiver of Wrecks.*

7. In an action for a collision, the examination of the captain of the plaintiff's ship, taken by the receiver of wrecks under the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 448, is not admissible for the defendant, under s. 449, for the purpose of proving the fact that the damage to the plaintiff's ship from the collision was on her starboard bow; such fact being offered for the purpose of showing that the plaintiff's ship was in fault,—the question which ship caused the damage to the other not being a matter which the receiver had power under s. 448 to examine into. *Nothard v. Pepper*, 39.

**SIMULATED PAPERS.**—See **INSURANCE**, 6-11.

**SUNDERLAND LOCAL ACT.**—See **RATE**.

**SWINE.**—See **NUISANCE**.

**TAVERN.**—See **ALNHUSE**.

**TRAVELLERS.**—See **ALNHUSE**.

**TRESPASS.***Where maintainable.*

Entry is not necessary to the vesting of a term of years in the lessee; but, for the purpose of maintaining an action of trespass, the lessee must enter, since that action is founded on the actual possession. *Harrison v. Blackburn*, 678.

**VENDOR AND PURCHASER.***Rescission of Contract.*

By a memorandum of the 19th of August, 1862, the defendants contracted to sell certain freehold premises to the plaintiffs for 2850*l.*, 285*l.* to be paid at once to the vendors' solicitor as a deposit, and the residue on the 29th of October: and it was mutually agreed that the vendors should deliver an abstract, and that the purchasers should within twenty-one days after the delivery of the abstract, deliver in writing to the vendors' solicitor their objections, if any, to, or requisitions on, the title. It then went on to provide, that "in case any objection or requisition shall be so delivered, and the vendors shall be unable or unwilling to comply therewith or remove the same, they are to be at liberty, by notice, &c., to rescind their contract and return the deposit-money, without interest or

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874

14

## INDEX.

### VENDOR AND PURCHASER.

#### *Rescission of Contract (continued).*

other compensation, notwithstanding any attempt made to remove or comply with such objection or requisition."

An abstract was delivered to the purchasers' solicitor on the 6th of September. On the 22d of September objections and requisitions were delivered to the vendors' solicitor. On the 4th of November (which was six days after the time mentioned in the contract for the completion thereof), the vendors' solicitor forwarded to the purchasers' solicitor replies to the requisition on title. Nothing further was done until the 29th of November, when the plaintiffs issued a writ against the vendors' solicitor to recover back the 285*l.* deposited with him. The deposit was thereupon returned: and on the 11th of December the vendors gave notice to rescind the contract.

In an action brought by the purchasers on the 16th of December, to recover interest on the deposit, and their costs of investigating the title:—Held, that the vendors were not bound to exercise their option to rescind immediately on receiving the objections and requisitions, or before the day named for the completion of the contract; but that,—time not being the essence of the contract,—they might do so within a reasonable time, and that, under the circumstances (which the court were to deal with as a jury ought), their notice was given within a reasonable time. *St. Leonards, Shoreditch (Vestry) v. Hughes*, 137.

### VENUE.

#### *Changing.*

1. It is no ground for changing the venue in an action for a libel contained in a local newspaper, that the defendant, the proprietor, possesses much influence in the county in which the venue is laid, and has since the commencement of the action evinced a disposition to exercise it to the plaintiff's prejudice. *Walker v. Brogden*, 571.

2. But the court intimated that they would interfere if the defendant should before the trial publish anything in relation to the matter of the action reflecting upon the plaintiff. *Ib.*

### VESTRYMEN.

#### *Qualification of.* See RATE.

### WARRANTY.

#### *On Sale of Goods.*

*Of Title.*] 1. In the case of goods sold in an open shop or warehouse, there is an implied warranty on the part of the seller that he is the owner of the goods: and, if it turns out otherwise,—as, where the goods are claimed by the true owner, from whom they have been stolen,—the buyer may recover back the price as money paid upon a consideration which has failed. *Eichholz v. Bannister*, 708.

*Of Quality.*] 2. A., after inspection of the separate parts, bought of B. soap-frames which were by the contract warranted to be "new frames, with all nuts and bolts complete and perfect." In an action for a breach of this warranty, the declaration alleged that the plaintiff warranted the frames to be fit for the purpose of making soap: and at the trial it was proved, and found by the jury, that, though new, and having the proper number of nuts and bolts, the frames were not reasonably fit for the purpose of making soap:—Held, that the evidence sustained the declaration. *Mallan v. Radloff*, 588.

3. Upon the sale of an ascertained article, a known machine, the component parts of which have been inspected by the buyer,—*Quare*, whether there is any implied warranty that the thing is fit for the purpose for which it professes to have been constructed? *Ib.*

### WILL.

#### *Presumption of Revocation of.*

Where a will and codicil (the drafts of which were produced) were proved to have been left by the attorney who drew them with the testator after execution, but were not forthcoming after his death,—declarations of the testator to various members of his family down to a few days before his death, expressive of his satisfaction at having settled his affairs, and intimating that his will was left with his attorney, were held to have been properly admitted, to rebut the presumption that the will and codicil had been destroyed by the testator *animo revocandi*. *Whiteley v. King*, 756.

### WITNESS.

#### *To interpret a Document.*

It is not competent to a witness who is called to interpret a foreign document, to give an opinion as to its construction: that is for the court. *The Stearine Kaarsen Fabriek Gonda Company v. Heintzmann*, 56.

### WRECKS,

#### *Receiver of.*—See SHIPPING, 7.





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